Due Process, Choice of Law, and the Prosecution of Foreign Nationals for Providing Material Support to Terrorist Organizations in Conflicts Abroad

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Brian M. Kelly*

Introduction

In November 2012, a grand jury in the Eastern District of New York indicted Ali Yasin Ahmed, Mahdi Hashi, and Mohamed Yusuf under 18 U.S.C. § 2339B for knowingly and intentionally conspiring to provide material support and resources, including services, currency, weapons, and personnel, to al-Shabaab, a designated foreign terrorist organization.[1] Although there is nothing exceptional about the United States prosecuting individuals for providing material support for terrorism, *United States v. Ahmed* represents a marked shift from prior 18 U.S.C. § 2339B prosecutions because neither the defendants nor their conduct has any apparent nexus to the United States.[2] None of the three Somali-born defendants is an American citizen; Ahmed and Yusuf are Swedish nationals and Hashi was a British citizen until the United Kingdom stripped him of his citizenship in 2010.[3] The three were reportedly captured by Djiboutian authorities while traveling from Somalia to Yemen and then interrogated by U.S. officials in Djibouti. There is no indication that any of the men ever stepped foot in the United States before they were transferred to FBI custody and flown to New York and arrested. The defendants, who maintain that they are freedom fighters waging a war on foreign soil

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[1] *See* Superseding Indictment, United States v. Ali Yasin Ahmed, also known as "Ismail," Madhi Hashi, also known as "Talha," and Mohamed Yusuf, also known as "Abu Zaid," "Hudeyfa" and "Mohammed Abdulkadir," No. 12 Cr. 661, 2012 WL 6721134 (E.D.N.Y. Nov. 15, 2012); 18 U.S.C. § 2339B (2012); *see also* Office of the U.S. Attorney for the Eastern District of New York, *Three Supporters of Foreign Terrorist Organization al Shabaab Charged in Brooklyn Federal Court, Face Life in Prison*, Dec. 21, 2012, http://www.fbi.gov/newyork/press-releases/2012/three-supporters-of-foreign-terrorist-organization-al-shabaab-charged-in-brooklyn-federal-court-face-life-in-prison.

[2] *See* Mosi Secret, *Three Men Appear in Court in Mysterious Terror Case*, N.Y. TIMES, Dec. 21, 2012, ("Court documents show no connection between the alleged crimes and the United States."); Eugene Kontorovich, *The Offenses Clause & Universal Jurisdiction Over Terrorists*, THE VOLOKH CONSPIRACY, Jan. 2, 2013, http://www.volokh.com/2013/01/02/the-offenses-clause-universal-jurisdiction-over-terrorists/ ("This is an extraordinary, almost unique case: none of the people or conduct has any connection to the U.S. . . . there is no suggestion that they planned to target American nationals or facilities, or had even ever been to this country before . . . . [instead] [t]he U.S. is prosecuting foreign nationals for their participation in a foreign civil war.").

[3] Mark Hosenball, *New York case offers insight into secret war against Somali militants*, REUTERS, Oct. 6, 2013, http://www.reuters.com/article/2013/10/06/us-usa-shabaab-rendition-idUSBRE9950HX20131006; Corinne Purtill, *The curious case of Mahdi Hashi*, THE GLOBAL POST, Aug. 9, 2013, http://www.globalpost.com/dispatch/news/regions/europe/united-kingdom/130808/britain-immigration-citizenship-mahdi-hashi.

against a foreign government, have pled not guilty and claim that they have not committed any acts of terrorism against the United States. As one of the defendants' lawyers told reporters, "He feels he never intended any harm to the United States or United States citizens . . . He looked up to the United States."[4]

The plight of the defendants in *United States v. Ahmed* raises a new and important question: does the extraterritorial application of 18 U.S.C. § 2339B in such a case—one in which foreign nationals on foreign soil allegedly supported a foreign terrorist organization in its war against a foreign government—violate due process? The Supreme Court has never considered the issue of whether the protections of the Fifth Amendment's Due Process Clause extend to foreign nationals in extraterritorial prosecutions, although a handful of legal scholars have debated the question.[5] As a result, there is considerable confusion in the circuits today over how due process applies in these cases. To date, all seven circuits that have addressed this question have assumed that alien defendants in extraterritorial prosecutions do have due process rights and have held—in recognition of the Supreme Court's state choice of law standard in *Allstate Ins. Co. v. Hague*—that the extraterritorial application of U.S. criminal law to foreign nationals must not be "arbitrary or fundamentally unfair."[6]

However, there is a split in the circuits over what standard courts should use to assess whether the extraterritorial application of U.S. law to a foreign national is arbitrary or fundamentally unfair. The Second, Fourth, and Ninth circuits, for instance, maintain that to comply with due process, there must be some nexus between the United States and the defendants' conduct, except in cases of crimes subject to universal jurisdiction, where no such connection is necessary.[7] The First, Third, Fifth, and Eleventh circuits, by contrast, evaluate whether such an extraterritorial application of U.S. law is arbitrary or fundamentally unfair by inquiring whether the defendant had notice or fair warning that his conduct was subject to U.S. regulation.[8] To determine if there was notice, these circuits have typically looked to whether customary international legal principles provide a basis for the United States to exercise extraterritorial prescriptive jurisdiction over the defendant.[9]

As this paper's analysis of the potential due process claims in *United States v. Ahmed* will demonstrate, this confusion in the circuits has real and significant consequences for alien defendants in extraterritorial material support to terrorism prosecutions. Under the nexus criteria that the District Court for the Eastern District of New York is likely to apply, the court will probably find a sufficient connection to the United States such that the prosecution of the alien defendants under 18 U.S.C. § 2339B is neither arbitrary nor fundamentally unfair and is, thus, consistent with due process. As

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[4] Christie Smythe, *Accused Al-Shabaab Associate Wants Trial, Lawyer Says*, BLOOMBERG NEWS, Sept. 30, 2013, http://www.businessweek.com/news/2013-09-30/accused-al-shabaab-associate-wants-trial-lawyer-says-1.
[5] *See infra* Part II.A.
[6] *See infra* Part III.
[7] *See infra* Part III.A.
[8] *See infra* Part III.B.
[9] *See id.*

a designated foreign terrorist organization, the Secretary of State has certified that al-Shabaab threatens the security of U.S. nationals or the national security—including the national defense, foreign relations, or the economic interests—of the United States.[10] Therefore, any material support that the defendants provided to al-Shabaab threatens U.S. interests in the stability of Somalia and the Horn of Africa.[11] Moreover, by the logic of *Holder v. Humanitarian Law Project*, the defendants' material support to al-Shabaab, even if it was directed exclusively at a foreign government, freed up other resources that al-Shabaab could direct against the United States.[12] Thus, by this reasoning, there will always be a sufficient connection to the United States in extraterritorial 18 U.S.C. § 2339B prosecutions, so alien defendants can never prevail on due process grounds in nexus test jurisdictions.

By contrast, if the defendants in *United States v. Ahmed* were prosecuted in the First, Third, Fifth, or Eleventh circuits, which apply a notice test, they would have a much better chance of persuading a court that extraterritorially subjecting them to 18 U.S.C. § 2339B is arbitrary and fundamentally unfair and, thus, violates their due process rights. In a notice test jurisdiction, the defendants could argue that they could not have reasonably anticipated being prosecuted in U.S. court for their conduct because, while customary international law might recognize that the United States has prescriptive jurisdiction over certain overseas conduct, there is no international legal basis for the United States to exercise extraterritorial jurisdiction over material support to a foreign terrorist organization where that support is not directed against the United States or U.S. nationals.[13] Thus, without any fair warning that the United States could prosecute the defendants for their overseas conduct, a court in a notice test jurisdiction might decide that the extraterritorial application of 18 U.S.C. § 2339B to Ahmed and his co-defendants is inconsistent with the Fifth Amendment's Due Process Clause.

The question of how to assess the due process rights of foreign nationals—assuming they do have such rights—in extraterritorial 18 U.S.C. § 2339B prosecutions is one of growing significance. As the United States moves away from an armed conflict paradigm with al-Qa'ida and its affiliates, and abandons the military commission model of prosecution, it will increasingly seek to prosecute foreign terrorist suspects in federal court.[14] Given Congress's broad powers to regulate extraterritorial conduct, facial challenges to extraterritorial statutes from defendants are unlikely; instead, many foreign defendants may choose to raise due process arguments to challenge the application of 18

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[10] U.S. Dep't of State, Bureau of Counterterrorism, "Foreign Terrorist Organizations," (Accessed July 6, 2014), http://www.state.gov/j/ct/rls/other/des/123085.htm (describing the legal criteria for the designation of a foreign terrorist organization under § 219 of the Immigration and Nationality Act).

[11] *See infra* Part IV.A.

[12] *See id.*

[13] *See infra* Part IV.B.

[14] *See, e.g.*, Jennifer Steinhauer and Charlie Savage, *U.S. Defends Prosecuting Benghazi Suspect in Civilian Rather Than Military Court*, N.Y. TIMES, June 17, 2014, http://www.nytimes.com/2014/06/18/world/middleeast/us-defends-prosecuting-benghazi-suspect-in-civilian-rather-than-military-court.html (discussing the Obama Administration's strategy of prosecuting foreign terrorist suspects in federal court and quoting a White House spokesperson as saying, "We have had substantial success delivering swift justice to terrorists through our federal court system.").

U.S.C. § 2339B in their specific case. Thus, it is critically important that courts agree on a fair and uniform standard for ensuring that the government prosecutes foreign nationals for providing material support to foreign terrorist organizations overseas in a way that is consistent with the Fifth Amendment's Due Process Clause.

This paper is intended to serve as an initial step in resolving that debate. Part I begins by discussing the Constitution's grant of broad powers to Congress to legislate extraterritorially and then examines the customary international legal bases of prescriptive jurisdiction that permit a sovereign state to regulate conduct outside of its borders. Part II discusses the debate between legal scholars, chiefly Professors Brilmayer, Norchi, and Weisburd, over whether the protections of the Fifth Amendment's Due Process Clause extend to foreign nationals in extraterritorial prosecutions and, if so, how courts should evaluate defendants' due process rights. Part III analyzes the current split in the circuits and assesses the driving factors behind the competing nexus and notice due process tests. Lastly, Part IV uses *United States v. Ahmed* as a case study to explore the different prospects of the defendants' due process claims in nexus and notice test jurisdictions and finds that, whereas the defendants will always lose under the nexus standard, they would probably prevail under the notice test. This section argues that, although the nexus test is more faithful to the Supreme Court's permissive *Allstate Ins. Co. v. Hague* choice of law standard, the nexus test's emphasis on the United States' contacts with, and its interests arising from, a foreign national's overseas conduct has created an insurmountable obstacle to alien defendants who invoke due process in extraterritorial 18 U.S.C. § 2339B prosecutions. Instead, this paper concludes that the notice test is better suited for judging the due process claims of foreign nationals in prosecutions for providing material support to terrorist organizations overseas because it is more consistent with traditional notions of due process as an individual right and with the Supreme Court's concern about the reasonable expectations of defendants, rather than the interests of the regulating state, in *Home Ins. Co. v. Dick*.

II. Congress's Authority to Regulate Extraterritorial Conduct

A. The Constitution's Grant of Extraterritorial Power to Congress

Article I of the Constitution confers on Congress broad powers to regulate extraterritorial conduct. In proscribing material support to terrorism, Congress invoked its powers to define and punish crimes against the law of nations, to carry out the United States' treaty obligations, and to regulate foreign commerce.[15] Given the breadth of extraterritorial authority that the Constitution grants to Congress, facial challenges by foreign national defendants in extraterritorial 18 U.S.C. § 2339B prosecutions are unlikely to succeed. Instead, a foreign national is more likely to prevail in arguing that,

[15] *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–32, 110 Stat 1214, § 301(a). Whether Congress could rely on some inherent foreign affairs powers to pass this statute is beyond the scope of this paper because, in the statute's findings, Congress only invoked its Article I authority to define and punish offenses against the law of nations, to regulate commerce with foreign nations, and to carry out the United States' treaty obligations. *See* U.S. CONST. art. I, § 8. For a discussion of the inherent external powers of Congress and the President, see United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

regardless of whether Congress enacted 18 U.S.C. § 2339B in accordance with its enumerated powers, the application of this statute to the foreign national's specific overseas conduct is arbitrary or fundamentally unfair and, therefore, violates the Fifth Amendment's Due Process Clause.

1. Define and Punish Clause

Congress first cited its Define and Punish powers in enacting 18 U.S.C. § 2339B. Article I, Section 8, Clause 10 of the Constitution grants Congress the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[16] In defining offenses against the law of nations, the Supreme Court has held that Congress' power is limited to actual violations of customary international law.[17] Otherwise, Congress could bring any extraterritorial act within its jurisdiction by simply defining it as an offense against the law of nations.[18] However, the Court has also held that, for the purposes of the Define and Punish Clause, the Constitution did not freeze the law of nations at the time that the Framers drafted it; rather, the Court has said that Congress has the authority to regulate present-day violations of the law of nations so long as they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms [like piracy]."[19]

In invoking its powers under the Define and Punish Clause in the findings section of 18 U.S.C. § 2339B, Congress implied that terrorism and material support to terrorism have attained the normative status of other universally condemned crimes, like piracy.[20] Certainly, there is some support in the case law and legal scholarship that customary international law has evolved to prohibit acts of terrorism.[21] For instance, some courts

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[16] U.S. CONST. art. I, § 8, cl. 10.

[17] United States v. Arjona, 120 U.S. 479, 488 (1887) ("Whether the offence as defined is an offence against the law of nations depends on the thing done, not on any declaration to that effect by Congress.").

[18] *See* United States v. Furlong, 18 U.S. 184, 198 (1820) (noting that, if Congress were given the power to define violations of the law of nations, "what offence might not be brought within their power by the same device?"); *see also* 2 JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787, 563 (Gallard Hunt & James Brown Scott, eds., 1987) (documenting the debate between Governour Morris and James Wilson over the use of the word "define" with reference to the "law of nations" in the Define and Punish Clause and noting Wilson's concern that "[t]o pretend to define the law of nations which depended on the authority of all the Civilized nations of the World, would have a look of arrogance, that would make us ridiculous."); Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1675 (2012) (arguing that the Define and Punish Clause only allows Congress to specify the elements and incidents of offenses already created by customary international law).

[19] Sosa v. Alvarez-Machain, 542 U.S. 692, 725 (2004).

[20] *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–32, 110 Stat 1214, § 301(a)(2) ("the Constitution confers upon Congress the power to punish crimes against the law of nations and to carry out the treaty obligations of the United States, and therefore Congress may by law impose penalties relating to the provision of material support to foreign organizations engaged in terrorist activity;").

[21] The Restatement (Third), however, declined to take a firm position on this issue. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and *perhaps* certain acts of terrorism . . . .") (emphasis added).

have looked to multilateral treaties condemning certain acts of terrorism, like taking hostages or hijacking aircraft, to determine that these acts violate customary international law.[22] Professor Anthony Colangelo, similarly, has argued that international conventions proscribing certain terrorist acts, such as bombing public places, infrastructure, transportation systems, airports, and aircraft, provide persuasive evidence that customary international law prohibits these acts.[23] However, other courts have come to the opposite conclusion,[24] and even Professor Colangelo has acknowledged that the absence of multilateral conventions prohibiting material support to, or receiving training from, a foreign terrorist organization demonstrates that these acts are not violations of customary international law.[25] This would suggest that Congress requires another basis under the Constitution to proscribe material support to terrorism overseas.

2. Treaty Power

Congress cited its authority to carry out the United States' treaty obligations as a secondary basis for enacting 18 U.S.C. § 2339B.[26] Article I, Section 8, Clause 18 of the Constitution grants Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[27] Chief Justice Marshall confirmed the breadth of power granted to Congress under the Necessary and Proper Clause in *McCulloch v. Maryland* when he famously proclaimed: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited,

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[22] *See, e.g.*, United States v. Yunis, 681 F. Supp. 896, 901 (D.D.C. 1988) *aff'd*, 924 F.2d 1086 (D.C. Cir. 1991) (arguing that "in light of the global efforts to punish aircraft piracy and hostage taking . . . these crimes fit within the category of heinous crimes for purposes of asserting universal jurisdiction.").

[23] Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L.J. 121, 176–77 (2007). Professor Colangelo's list of acts of terrorism that are prohibited by customary international law also includes "hijacking aircraft, hostage taking, and even financing terrorist organizations." *Id.*

[24] *See, e.g.*, United States v. Yousef, 327 F.3d 56, 106–08 (2d Cir. 2003) ("[w]e regrettably are no closer . . . to an international consensus on the definition of terrorism or even its proscription; the mere existence of the phrase 'state-sponsored terrorism' proves the absence of agreement on basic terms among a large number of States that terrorism violates public international law. Moreover, there continues to be strenuous disagreement among States about what actions do or do not constitute terrorism, nor have we shaken ourselves free of the cliché that 'one man's terrorist is another man's freedom fighter.'") (internal citations omitted); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984) (Edwards, J., concurring) ("While this nation unequivocally condemns all terrorist attacks, that sentiment is not universal. Indeed, the nations of the world are so divisively split on the legitimacy of such aggression as to make it impossible to pinpoint an area of harmony or consensus . . . Given this division, I do not believe that under current law terrorist attacks amount to law of nations violations.").

[25] *See* Colangelo, *supra* 23, at 186; *see also* Alexander Urbelis, *Rethinking Extraterritorial Prosecution in the War on Terror: Examining the Unintentional Yet Foreseeable Consequences of Extraterritorially Criminalizing the Provision of Material Support to Terrorists and Foreign Terrorist Organizations*, 22 CONN. J. INT'L L. 313, 324 (2007).

[26] *See* Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–32, 110 Stat 1214, § 301(a)(2) ("the Constitution confers upon Congress the power to punish crimes against the law of nations and to carry out the treaty obligations of the United States, and therefore Congress may by law impose penalties relating to the provision of material support to foreign organizations engaged in terrorist activity;").

[27] U.S. CONST. art. I, § 8, cl. 18.

but consist with the letter and spirit of the constitution, are constitutional."[28] Although Chief Justice Roberts' opinion in *National Federation of Independent Business v. Sebelius* walked back the Court's expansive interpretation of the Necessary and Proper Clause,[29] Congress nonetheless retains broad extraterritorial powers to implement U.S. treaty obligations. Because the United States is a party to a range of multilateral conventions prohibiting certain acts of terrorism—many of which have extraterritorial effect under so-called "extradite or prosecute" provisions—the Necessary and Proper Clause gives Congress the authority necessary to regulate the "bombing of public places, infrastructure, transportation systems, airports and aircraft, as well as [the] hijacking [of] aircraft, [and] hostage taking."[30] While Congress could frame some of the provisions of 18 U.S.C. § 2339B, such as its prohibition on providing "currency or monetary instruments or financial securities [or] financial services" to a designated terrorist organization, as the necessary and proper implementation of the United States' treaty obligations,[31] other extraterritorial provisions, such as its broad prohibition on "expert advice" to terrorist organizations, lack apparent justification in any treaty to which the United States is a party. Nonetheless, given the breadth of Congress's powers under the Necessary and Proper Clause, it seems highly unlikely that a foreign national bringing a facial challenge against such a provision would prevail.

3. Foreign Commerce Clause

Congress's tertiary basis for 18 U.S.C. § 2339B is its power under Article I, Section 8, Clause 3 of the Constitution "[t]o regulate Commerce with foreign Nations."[32] Specifically, Congress noted the effect of terrorism on international trade, market stability, and international travel.[33] Although Congress's power to regulate interstate commerce has been interpreted quite broadly,[34] the extent of its authority to regulate

[28] M'Culloch v. State of Maryland, 17 U.S. 316, 421 (1819).
[29] National Federation of Independent Business v. Sebelius, 132 S. Ct. 2566 (2012).
[30] Colangelo, *supra* note 23, at 176–77 (citing the International Convention for the Suppression of Terrorist Bombings art. 2, Dec. 15, 1997, G.A. Res. 52/164; the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation (Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation) art. 2, Feb. 24, 1988, S. Treaty Doc. No. 100-19, 27 I.L.M. 627; the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation art. 1, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178; the Convention for the Suppression of Unlawful Seizure of Aircraft art. 1, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; and the International Convention Against the Taking of Hostages art. 1, T.I.A.S. No. 11,081, Dec. 17, 1979, 1136 U.N.T.S. 205).
[31] For instance, Congress could argue that prohibiting the provision of currency, monetary instruments, financial securities, and financial services to terrorist organizations is necessary and proper for Congress to implement the United States' obligations under the International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, U.N. Doc. A/54/49 (1999).
[32] Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–32, 110 Stat 1214, § 301(a)(4) ("international terrorism affects the interstate and foreign commerce of the United States by harming international trade and market stability, and limiting international travel by United States citizens as well as foreign visitors to the United States;").
[33] *Id.*
[34] *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (permitting Congress to regulate local activity that is not itself commerce as long as, in aggregate, that activity exerts a substantial effect on interstate commerce). *But see* United States v. Lopez, 514 U.S. 549 (1995) (limiting Congress's commerce powers to

commerce with foreign nations is, by comparison, relatively ill-defined. As the Ninth Circuit has said," [i]t is not so much that the contours of the Foreign Commerce Clause are crystal clear, but rather that their scope has yet to be subjected to judicial scrutiny."[35]

There is reason to believe that Congress's power to regulate commerce with foreign nations should not be construed in the same way as its authority to regulate commerce amongst the states. As the Supreme Court has noted, there are structural differences between the federal government's relationship with the states and its relationship with other sovereign nations;[36] after all, unlike the states, foreign nations did not submit any of their sovereign powers to Congress in the Constitution.[37] Other clues to the limitations of Congress's power under the Foreign Commerce Clause may be found in its text. For one, the clause refers to commerce "with," rather than "amongst," foreign nations.[38] This, Professor Colangelo has argued, suggests that an extraterritorial activity must have some nexus to the United States in order for Congress to regulate it.[39] This reading of the text would also comport with the Framers' well-documented concern about not unduly interfering in the affairs of foreign sovereigns.[40] Moreover, if a nexus to the United States were not required, then, as Professor Eugene Kontorovich has noted, the Foreign Commerce Clause would have conferred on Congress broad universal powers,

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the regulation of commercial activity or activity that substantially affects interstate commerce); United States v. Morrison, 529 U.S. 598 (2000) (preventing Congress from using its commerce powers to regulate non-economic activity that has traditionally been regulated by the states, even if that non-economic activity in aggregate has a substantial effect on interstate commerce).

[35] United States v. Clark, 435 F.3d 1100, 1102 (9th Cir. 2006) (as quoted by Colangelo, *supra* note 23, at 146).

[36] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 448 (1979) ("Although the Constitution, Art. I, § 8, cl. 3, grants Congress power to regulate commerce 'with foreign Nations' and 'among the several States' in parallel phrases, there is evidence that the Founders intended the scope of the foreign commerce power to be the greater."); *id.* at 448 n.13 (" . . . Congress's power to regulate interstate commerce may be restricted by considerations of federalism and state sovereignty. It has never been suggested that Congress's power to regulate foreign commerce could be so limited."); Board of Trustees of University of Illinois v. United States, 289 U.S. 48, 57 ("The principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce.").

[37] Yunis, 681 F. Supp. at 907 ("Certainly Congress has plenary power to regulate the flow of commerce within the boundaries of United States territory. But it is not empowered to regulate foreign commerce which has no connection to the United States. Unlike the states, foreign nations have never submitted to the sovereignty of the United States government nor ceded their regulatory powers to the United States."); *see also* Colangelo, *supra* note 23, at 149.

[38] U.S. CONST. art. I, § 8, cl. 3.

[39] Colangelo, *supra* note 23, at 147 (arguing that the "use of the word 'with' in the Clause's phrase 'with foreign Nations' indicates on its face some U.S. connection to the commerce that is the subject of federal regulation.").

[40] *See, e.g.*, The Antelope, 23 U.S. 66, 122 (1825) (Chief Justice Marshall explaining that because of "the perfect equality of nations . . . . no [nation] can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."); Alexander Hamilton, CAMILLUS XXXVI ("Congress . . . may regulate, by law, our own trade and that which foreigners come to carry on with us; but they cannot regulate the trade which we may go to carry on in foreign countries; they can give to us no rights, no privileges, there. This must depend on the will and regulations of those countries; and, consequently, it is the province of the power of treaty to establish the rules of commercial intercourse between foreign nations and the United States. The legislative may regulate our own trade, but treaty only can regulate the national trade between our own and another country"); *see* Colangelo, *supra* note 23, at 149.

which seems unlikely given how uncontroversial the clause was at the time of its drafting, in contrast to its interstate cousin, which was the subject of fierce debate.[41]

Nonetheless, it is highly improbable that a foreign national could successfully contest the constitutionality of 18 U.S.C. § 2339B under the Foreign Commerce Clause. Given how broadly the Supreme Court has interpreted Congress's interstate commerce powers, even if Congress's foreign commerce authority is more limited, it does not seem unreasonable that Congress could have the power to proscribe terrorist acts overseas that have a substantial effect on the United States' commerce with foreign nations. Instead, as Part II will argue, foreign nationals prosecuted for providing material support to a foreign terrorist organization overseas are more likely to prevail by arguing that the extraterritorial application of 18 U.S.C. § 2339B to their specific conduct is arbitrary or fundamentally unfair and, therefore, violates the Fifth Amendment's Due Process Clause.

B. International Customary Bases of Extraterritorial Prescriptive Jurisdiction

Although the U.S. Constitution does not require Congress to comply with international law, the First, Third, Fifth, and Eleventh circuits, as Part III will explain, have suggested that courts should look to international law to assess whether a foreign national had fair warning that he or she could be extraterritorially subjected to U.S. law.[42] Thus, an analysis of the current circuit split in federal choice of law standards in extraterritorial prosecutions of foreign nationals must explain the bounds of customary international law in permitting criminal jurisdiction beyond a state's borders.

Under international law, a state may only apply its national law extraterritorially when that state has so-called "prescriptive jurisdiction" under one of five recognized bases or principles[43]:

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[41] *See* Eugene Kontorovich, *Foreign Commerce Authority for Universal Jurisdiction over Terrorists*, THE VOLOKH CONSPIRACY, Jan. 9, 2013, http://www.volokh.com/2013/01/09/the-material-support-statute-a-neutrality-act-for-everyone/. Professor Kontorovich also notes that, even if one were to argue that Congress is not restricted by the Constitution in regulating activities overseas, it is unlikely that Congress possesses any inherent sovereign power to regulate foreign commerce that does not have a nexus to the United States because no other sovereign nation claims such an expansive right. *Id.*

[42] *See, e.g.*, Yunis, 924 F.2d at 1091 ("Yunis seeks to portray international law as a self-executing code that trumps domestic law whenever the two conflict. That effort misconceives the role of judges as appliers of international law and as participants in the federal system. Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law."); Yousef, 327 F.3d at 86 ("In determining whether Congress intended a federal statute to apply to overseas conduct, an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains. Nonetheless, in fashioning the reach of our criminal law, Congress is not bound by international law. If it chooses to do so, it may legislate with respect to conduct outside the United States, in excess of the limits posed by international law.") (internal quotation marks omitted). In any event, the *Charming Betsy* canon dictates that a statute shall not be construed as violating the law of nations unless there is no other possible construction. *See* Murray v. The Schooner Charming Betsy, 6 U.S. 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . . .").

[43] *See, e.g.*, Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (1993) (explaining that the "'the law of nations,' or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe."); Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323 (2001)

- (1) *Territorial Principle* - Under the territorial principle, a state may regulate acts that occur or take effect, wholly or in substantial part, within its borders.[44] This principle is often described as encompassing two distinct sub-principles. The subjective territorial principle permits the state to regulate acts that are commenced within its territory, but are consummated or completed outside its borders.[45] By contrast, the objective territorial principle, often called the "effects" doctrine, allows a state to regulate acts that take effect within its territory even if they are physically committed outside of its borders.[46]

- (2) *Nationality Principle* – The nationality principle permits a state to regulate the activities, interests, status, or relations of its citizens even when they are beyond the territory of the state.[47]

- (3) *Protective Principle* – The protective principle, which could be conceived of as a form of the objective territorial principle, permits a state to extraterritorially regulate acts that are directed against the security of the state or other governmental functions so long as those acts are "generally recognized as crimes by developed legal systems."[48]

("Unless a nation's extraterritorial law falls within one of five categories—territoriality, nationality, protective principle, passive personality, or universality—it is said, the nation violates international law rules governing prescriptive jurisdiction.") (internal quotation marks omitted). This five part categorization, based on state practice and *opinio juris*, is most often credited to an influential Harvard research project. *See* Harvard Research in International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. OF INT'L L. SUPP. 439, 445 (1935) ("An analysis . . . discloses five general principles on which a more or less extensive penal jurisdiction is claimed by States at the present time. These five general principles are: first, the territorial principle, determining jurisdiction by reference to the place where the offence is committed; second, the nationality principle, determining jurisdiction by reference to the nationality or national character of the person committing the offence; third, the protective principle, determining jurisdiction by reference to the national interest injured by the offence; fourth, the universality principle, determining jurisdiction by reference to the custody of the person committing the offence; and fifth, the passive personality principle, determining jurisdiction by reference to the nationality or national character of the person injured by the offence. Of these five principles, the first is everywhere regarded as of primary importance and of fundamental character. The second is universally accepted, though there are striking differences in the extent to which it is used in different national systems. The third is claimed by most States, regarded with misgivings in a few, and generally ranked as the basis for an auxiliary competence. The fourth is widely though by no means universally accepted as the basis of an auxiliary competence, except for the offence of piracy, with respect to which it is the generally recognized principle of jurisdiction. The fifth, asserted in some form by a considerable number of States and contested by others, is admittedly auxiliary in character and is probably not essential for any State if the ends served are adequately provided for on other principles.").

[44] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

[45] *See id.* at § 402(1)(a).

[46] *See id.* at § 402(1)(c) cmt. d.

[47] *See id.* at § 402(2).

[48] *See id.* at § 402(3) cmt. f ("Subsection (3) restates the protective principle of jurisdiction [which is] the right of a state to punish a limited class of offenses committed outside its territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems, e.g., espionage, counterfeiting of the state's seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws. The protective

- (4) *Passive Personality Principle* – Under the passive personality principle, a state may regulate acts committed against its nationals anywhere in the world.[49]

- (5) *Universality Principle* – Even if none of the previous four principles is present, the universality principle permits a state to extraterritorially regulate acts of "universal concern," which include "piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism."[50]

In addition to requiring that a state's exercise of extraterritorial criminal jurisdiction fall into one of these five categories, the Restatement (Third) maintains that any exercise of jurisdiction under the first four categories—territorial, nationality, protective, and passive personality—must be reasonable. The Restatement evaluates reasonableness according to a number of factors, including the nexus between the regulating state's territory and the regulated act; the nexus between the regulating state and the person committing the regulated act; the importance of the regulation to the regulating state; the importance of the regulation to the international political, legal, or economic system; the extent to which the regulation is consistent with the traditions of the international system; as well as the extent to which another state may have an interest in regulating the act and the likelihood of conflict with the regulation of another state.[51] Nonetheless, it remains unclear whether reasonableness is actually a requirement under customary international law.[52]

II. Due Process Limitations on the Extraterritorial Application of U.S. Criminal Law

A. The Extraterritorial Reach of the Fifth Amendment's Due Process Clause

In light of the Constitution's grant of broad powers to Congress to regulate extraterritorial conduct, alien defendants in extraterritorial material support to terrorism cases could more successfully argue that the Fifth Amendment's Due Process Clause imposes limitations on the government's power to apply 18 U.S.C. § 2339B to them specifically. The possibility of foreign nationals invoking due process to contest the extraterritorial application of federal law in this way first gained serious traction in a 1992 article by Professors Lea Brilmayer and Charles Norchi.[53] Drawing a parallel to the Fourteenth Amendment's Due Process Clause, which is often invoked by citizens of one state to prevent the overreach of another state's long-arm statute, Professors Brilmayer

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principle may be seen as a special application of the effects principle . . . but it has been treated as an independent basis of jurisdiction.").

[49] *See id.* at § 402 cmt. g.

[50] *See id.* at § 404.

[51] *See id.* at § 403(2). The Restatement makes clear that this list of factors is not exhaustive. *Id.* at § 403(2) cmt. b.

[52] *See, e.g.,* Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L L. 53, 54 (1995) (arguing that "U.S. prescriptive jurisdiction has never been as sharply limited as suggested by section 403.").

[53] Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1223 (1992).

and Norchi argued that alien defendants could find similar refuge from the extraterritorial overreach of U.S. law in the Fifth Amendment.[54] Foreign nationals are entitled to the protections of the Fifth Amendment, according to this theory, because it modified Article I's grant of extraterritorial powers to Congress and—in contrast to the more restrictive language of the Fourth Amendment ("the People")—broadly extended these protections to "any person," which by its natural meaning includes foreign nationals overseas.[55] Although they acknowledged that the Supreme Court had never addressed the issue, and in fact had only recently declined to extend the Fourth Amendment's protections to extraterritorial searches and seizures by U.S. officials, Professors Brilmayer and Norchi argued that the identical texts of, and similar purposes behind, the Constitution's two Due Process Clauses should persuade the Supreme Court to extend due process protections to alien defendants against federal extraterritorial overreach.[56]

The Supreme Court's opinion in *United States v. Verdugo-Urquidez* probably presents the greatest obstacle to the theory of Professors Brilmayer and Norchi. In *Verdugo-Urquidez*, the Court declined to extend the Fourth Amendment's protection against unreasonable searches and seizures to a foreign national whose home in Mexico had been searched without a warrant by a team of U.S. and Mexican law enforcement officials.[57] In holding that the Fourth Amendment's reference to "the People" is only intended to include "the People of the United States," Chief Justice Rehnquist's plurality opinion, joined by Justices White, O'Connor, and Scalia, reasoned that the *Insular Cases* only guarantee "fundamental" constitutional rights to foreign nationals in unincorporated U.S. territory, so a foreign national's invocation of the Fourth Amendment with respect to a search and seizure on foreign soil is highly suspect.[58] Moreover, Chief Justice Rehnquist noted that the Court had declined to extend Fifth Amendment protections to alien enemy combatants in *Eisentrager*, despite the fact that the Fifth Amendment's reference to "any person" is seemingly more universal than the Fourth Amendment's reference to "the People."[59] By this reasoning, the plurality declined to extend the protections of the Fourth Amendment to alien defendants in extraterritorial prosecutions, even though, as Justice Brennan's dissent observed, the plurality had no objection to extending the obligation to comply with U.S. law to those same defendants.[60]

Nonetheless, it was Justice Kennedy's fifth vote that controlled *Verdugo-Urquidez* and his concurring opinion seemingly left the door open to extending Fifth Amendment due process rights to aliens prosecuted for extraterritorial conduct.[61] In agreeing that the Fourth Amendment's protections do not extend to foreign nationals

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[54] *Id.*
[55] *See id.* at 1236.
[56] *Id.* at 1223.
[57] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).
[58] *Id.* at 268 (citing Dorr v. United States, 195 U.S. 138, 146 (1904)).
[59] *Id.* at 269 (citing Johnson v. Eisentrager, 339 U.S. 763, 770 (1950)).
[60] *Id.* at 282 (Brennan, J., dissenting) ("The Court today creates an antilogy: the Constitution authorizes our Government to enforce our criminal laws abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them. This cannot be. At the very least, the Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law.").
[61] *Id.* at 278 (Kennedy, J., concurring).

outside the United States, Justice Kennedy declined to endorse the plurality's textual argument; instead, Justice Kennedy, citing Justice Harlan's concurrence in *Reid v. Covert*, argued that the Court should reject the defendant's claim because "[t]he conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous."[62] To Justice Kennedy, it was the practical difficulties of executing a search warrant overseas that militated against extending the Fourth Amendment's protections to foreign nationals. Professors Brilmayer and Norchi have argued that Justice Kennedy's reasoning distinguishes *Verdugo-Urquidez* from the Fifth Amendment question because, as Justice Kennedy himself suggested, extending the Fourth Amendment's search and seizure protections to foreign nationals in extraterritorial cases is significantly more impracticable than recognizing that foreign nationals in extraterritorial prosecutions are protected by the Fifth Amendment's Due Process Clause.[63] As a result, if the Fifth Amendment question ever does reach the Court, one could fairly anticipate that Justice Kennedy might take a practicality-driven approach to recognizing an alien defendant's due process rights, especially in light of his opinion in *Boumediene v. Bush*, which framed the Court's jurisprudence on the extraterritorial reach of the Constitution, from the *Insular Cases* to *Eisentrager* to *Reid*, as turning on "practical considerations."[64]

Nevertheless, even if the theory of Professors Brilmayer and Norchi survives *Verdugo-Urquidez*, there are other arguments against recognizing due process limitations on the extraterritorial reach of U.S. law. Most notably, Professor Mark Weisburd has argued that extending the protections of the Fifth Amendment's Due Process Clause to alien defendants in extraterritorial prosecutions would "den[y] to the United States a degree of authority recognized and asserted by most of the other nations of the world."[65] This, Professor Weisburd has claimed, would contradict the Supreme Court's declaration in *Curtiss-Wright* that "the right and power of the United States . . . are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign."[66] Moreover, Professor Weisburd has argued that there are legitimate differences between the sovereign powers of U.S. states and the federal government that militate against imposing similar due process limitations on their extraterritorial powers; for instance, in contrast to the federal government, U.S. states do not have foreign affairs or war powers and they have only limited authority to regulate commerce outside their territory.[67] Lastly, Professor Weisburd has noted that if the Framers had intended for the Fifth Amendment to modify Article I's broad grant of

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[62] *Id.*; *see* Colangelo, *supra* note 23, at 161 (discussing Justice Kennedy's context-driven approach in *Verdugo-Urquidez*).

[63] Brilmayer and Norchi, *supra* note 53, at 1236 ("The Fourth Amendment is unique in that evident difficulties exist with satisfying it in international cases, because it is unclear to whom the police would apply for a warrant to conduct a foreign search."); Verdugo-Urquidez, 494 U.S. at 278 (Kennedy, J., concurring) ("All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant.").

[64] Boumediene v. Bush, 553 U.S. 723, 762 (2008).

[65] A. Mark Weisburd, *Due Process Limits on Federal Extraterritorial Legislation?,* 35 COLUM. J. TRANSNAT'L L. 379, 383 (1997).

[66] *Id.* at 383 (citing United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936)).

[67] *Id.* at 408–17.

extraterritorial authority to Congress, one would expect this to have been the subject of a contentious debate, but there is no record of the Framers discussing the issue.[68]

Although Professor Weisburd has raised serious questions about the Fifth Amendment's extraterritorial reach, the context of the debate over the extraterritorial reach of the Fifth Amendment has changed tremendously since Professors Brilmayer, Norchi, and Weisburd engaged this issue in the 1990s. After a decade of Guantanamo habeas corpus decisions, one could argue that the Supreme Court has become increasingly skeptical of the sovereigntist theory that the Constitution does not constrain the U.S. government abroad.[69] Moreover, the seven circuits that have addressed this question have uniformly assumed that the protections of the Fifth Amendment's Due Process Clause extend to foreign nationals in extraterritorial prosecutions.[70] The dearth of instances in which these circuits have found that the extraterritorial application of U.S. law to foreign nationals violated their due process rights suggests that Professor Weisburd's fears of the courts unnecessarily constraining the United States' sovereign powers are unfounded. Regardless, until the Supreme Court decides otherwise, the fact that the Fifth Amendment's Due Process Clause imposes limitations on federal choice of law in extraterritorial prosecutions like *United States v. Ahmed* seems more or less beyond dispute.

B. Establishing a Due Process Standard in Extraterritorial Prosecutions

If one agrees that the Due Process Clauses of the Fifth and Fourteenth Amendments impose similar constraints on the extraterritorial application of federal and state law, respectively, then the most logical starting point for a federal choice of law test is the Supreme Court's *Allstate Ins. Co. v. Hague* state choice of law standard.[71] In *Allstate*, the widow of a Wisconsin man, who was killed in a motorcycle accident in Wisconsin but was employed in Minnesota, moved to Minnesota and sued her late husband's insurance company under Minnesota law, despite the fact that the accident took place in Wisconsin, all parties involved were Wisconsin residents at the time, and the insurance contract was concluded in Wisconsin.[72] In affirming the Minnesota Supreme Court's decision to apply Minnesota law to the controversy, the U.S. Supreme Court, in a plurality opinion by Justice Brennan, held that, for a state's substantive law to be selected in a manner consistent with the Fourteenth Amendment's Due Process Clause and Article IV's Full Faith and Credit Clause, the "State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law

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[68] *Id.* at 408.

[69] *See, e.g.*, Boumediene, 553 U.S. at 727 (explaining, in the context of the applicability of habeas corpus at the Guantanamo Bay detention camp, that "[t]he Nation's basic charter cannot be contracted away like this . . . . To hold that the political branches may switch the Constitution on or off at will would lead to a regime in which they, not this Court, say 'what the law is.'").

[70] *See* Colangelo, *supra* note 23, at 201 n.3 (noting that "courts that have considered the matter have uniformly held that such limits do exist, though they have been divided on what precisely the limits entail.").

[71] Brilmayer and Norchi, *supra* note 53, at 1239.

[72] Allstate Ins. Co. v. Hague, 449 U.S. 302, 303 (1981).

is neither arbitrary nor fundamentally unfair."[73] Although only three other justices joined Justice Brennan's *Allstate* opinion, a majority of the Court, noting that "[t]he dissenting justices [in *Allstate Ins. Co. v. Hague*] were in substantial agreement with this principle," ratified Justice Brennan's standard as controlling precedent four years later.[74]

The highly permissive choice of law standard that the Supreme Court established in *Allstate* has been controversial. In addition to what some commentators have viewed as the Court's conflation of two distinct inquiries, one under the Due Process Clause and the other under the Full Faith and Credit Clause,[75] others have criticized *Allstate* for evaluating due process—traditionally thought of as an individual right—by looking to the state's contacts with the controversy and the state's interests arising from those contacts.[76] This, some legal scholars have claimed, unfairly emphasizes state sovereignty interests at the expense of individual liberty.[77] Moreover, it gives less scrutiny to choice of law than personal jurisdiction, even though *how* a court decides a controversy is almost certainly more important for fairness purposes than *where* a court decides it.[78]

By contrast, in an earlier choice of law case, *Home Ins. Co. v. Dick*, the Supreme Court had seemed more concerned about the reasonable expectations of the defendant than the interests of the regulating state, although its analysis of each was closely intertwined.[79] In *Dick*, a nominal permanent resident of Texas, who was at the time domiciled in Mexico, brought suit in Texas to garnish the property of a New York corporation that had reinsured an insurance policy issued in Mexico, covering a risk in

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[73] Allstate, 449 U.S. at 312–13.

[74] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 818–19 (1985).

[75] *See, e.g.*, Thomas O. Main, *On Teaching Conflicts and Why I Dislike* Allstate Insurance Co. v. Hague, 12 NEV. L. J. 600 (2012) ("My principal criticism, then, is the Court's analytical framework: the collapse of two distinct constitutional questions into one . . . . Whether unprecedented or simply unusual, the combination of the Due Process and Full Faith and Credit Clauses into a single test in conflicts cases is unfortunate and problematic.").

[76] *See, e.g.*, Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 57 (1998) (". . . *Allstate* inappropriately emphasizes state sovereignty interests at the expense of fairness to defendants. The problem with this emphasis on state interests is that due process has nothing to do with the relations among the states (horizontal federalism); rather, due process concerns the relationship of a state to the individual.") (citation omitted).

[77] *Id.* ("The Court's due process analysis for choice of law ignores general principles of due process analysis and allows states to treat individuals unfairly . . . . *Allstate* stresses state interests over individual liberty interests, contravening the purpose of the Due Process Clause—the protection of individual liberty . . . . ") (citation omitted).

[78] *See* P. John Kozyris, *Reflections on Allstate - The Lessening of Due Process in Choice of Law*, 14 U.C. DAVIS L. REV 889, 891–92 (1981) ("State overreaching into the legislative domain of other states is potentially more destructive of the goals of federalism and more prejudicial to the rights of defendants than the concurrent jurisdiction of the courts of different states. After all, how to decide a case is more important than where to decide it."); Fruehwald, *supra* note 76, at 56–57 (". . . the Court should not give personal jurisdiction greater scrutiny than choice of law, as is presently the case . . . . because the governing law directly affects the trial's outcome while personal jurisdiction mainly involves convenience . . . . '[t]o believe that a defendant's contacts with the forum should be stronger under the Due Process Clause for jurisdictional purposes than for choice of law is to believe that an accused is more concerned about where he will be hanged than whether [he will be].'") (quoting Linda Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 88 (1978)).

[79] Home Ins. Co. v. Dick, 281 U.S. 397 (1930).

Mexico, and assigned by a Mexican insurer to a Mexican national.[80] In holding that the application of Texas law to the controversy violated the due process rights of the New York reinsurer, the Supreme Court noted that "nothing in any way relating to the policy sued on, or to the contracts of reinsurance, was ever done or required to be done in Texas."[81] The Court emphasized that the New York garnishees were not asking for any special favors in contesting the application of Texas law, but asking "only to be let alone."[82] Although somewhat sparse in its due process analysis and silent on its standard, the Court's reasoning in *Dick*, in contrast to *Allstate*, did not mix analysis of the Due Process Clause with the Full Faith and Credit Clause. Nonetheless, in establishing its state choice of law standard, *Allstate* framed *Dick* as turning on Texas' minimal contacts with the controversy and Texas' insignificant interests arising from those contacts, rather than on individual fairness to the New York defendant.[83]

Perhaps for this reason, Professors Brilmayer and Norchi chose the Court's *Allstate* decision rather than *Dick* as the initial basis for their proposed federal choice of law test, which maintains that due process requires minimum contacts with the United States, U.S. interests arising from those contacts, and fairness to the defendant.[84] To fulfill the first prong, the authors argued that, like state choice of law doctrine, "something about the controversy or the defendant must touch the forum,"[85] except in cases of jus cogens crimes subject to universal jurisdiction because the law of nations permits any state to prosecute the offender.[86] Professors Brilmayer and Norchi conceded that the second prong—state interests arising from contacts—is vague even in the state choice of law context, but they suggested that this would be met by any affirmative constitutional basis for Congress to regulate the extraterritorial activity in question, such as its commerce or foreign affairs powers.[87] Thus, the authors predicted that the prosecution of foreign nationals for overseas conduct would typically survive the U.S. interests prong because, if Congress lacked any affirmative basis to regulate the activity, the statute would be facially invalid.[88]

While Professors Brilmayer and Norchi did not acknowledge it as such, their third prong—individual fairness—appeared to constitute a departure from the *Allstate* standard, which emphasized forum state contacts and interests, and a step closer to *Dick*, which seemed more concerned about the expectations of the defendant. Professors Brilmayer and Norchi argued that this third prong is the most elusive and demanding for Fifth Amendment purposes.[89] They maintained that it requires something more than fair

[80] *Id.* at 402.
[81] *Id.* at 407–08.
[82] *Id.* at 410.
[83] Allstate, 449 U.S. at 310–11 ("*Dick* . . . stand[s] for the proposition that if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional. *Dick* concluded that nominal residence—standing alone—was inadequate [for the application of Texas law to be consistent with due process];").
[84] Brilmayer and Norchi, *supra* note 53, at 1242.
[85] *Id.*
[86] *Id.* at 1254.
[87] *Id.* at 1243.
[88] *Id.*
[89] *Id.*

warning that the foreign national might be subject to U.S. law because otherwise "the fairness requirement would be empty, for such notice could always be provided."[90] Professors Brilmayer and Norchi suggested that an alternative approach might be whether the foreign national voluntary affiliated himself with the United States, such as by doing business in, or intending to do harm to, the United States. They noted that this approach reveals the interrelatedness of the contacts and fairness prongs, but maintained that both must be independently satisfied. Although they acknowledged that such an approach to individual fairness poses "numerous difficulties," Professors Brilmayer and Norchi argued that it "captures some deeply held intuitions of Anglo-American political thought about fair subjection to sovereign power."[91]

III. The Circuit Split: The Nexus v. Notice Due Process Tests

Today there is a great deal of confusion in the circuits over the limitations that the Fifth Amendment's Due Process Clause imposes on federal choice of law in extraterritorial prosecutions of foreign nationals. All seven of the circuits that have addressed this question have presumed that these alien defendants can invoke the Fifth Amendment's Due Process Clause and each of these circuits has, in one form or another, incorporated *Allstate*'s arbitrary or fundamentally unfair standard. However, the circuits are split over the appropriate test by which to determine if the extraterritorial application of U.S. law to an alien is arbitrary or fundamentally unfair. Admittedly, categorizing the circuits' competing standards can be challenging since, in a number of these cases, courts either have neglected to provide a substantive explanation of their reasoning in adopting a certain standard or have approached the due process issue by analyzing Congress's authority to enact the statute with extraterritorial effect rather than inquiring into whether the statute was applied to the defendant consistent with due process. Nonetheless, a survey of the circuits reveals that three—the Second, Fourth, and Ninth—employ a "nexus" due process test that examines whether the alien defendant or his conduct has had, is having, or will have some connection to, or some impact on, the United States.[92] By contrast, the other four circuits that have addressed this issue—the First, Third, Fifth, and Eleventh—apply some form of a "notice" due process test, which inquires into whether the alien defendant had fair warning that the United States could prosecute him under U.S. law for his overseas conduct.[93] To determine if there is notice, these circuits have typically looked to whether customary international legal principles provide a basis for the United States to exercise extraterritorial prescriptive jurisdiction over the defendant's activity such that the defendant had fair warning.

A. The Nexus Test

1. Ninth Circuit

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[90] *Id.*
[91] *Id.* at 1244.
[92] Charles Doyle, *Extraterritorial Application of American Criminal Law*, CONGRESSIONAL RESEARCH SERVICE 6 (Feb. 15, 2012).
[93] *See* Brian Lichter, *The Offences Clause, Due Process, and the Extraterritorial Reach of Federal Criminal Law in Narco-Terrorism Prosecutions*, 103 NW. L. REV. 1929, 1942 (2009).

The Ninth Circuit was the first to articulate the nexus due process test for alien defendants in extraterritorial prosecutions.[94] In *United States v. Davis*, a foreign national in a foreign-flagged vessel stopped by the U.S. Coast Guard in international waters off the coast of California was charged with trafficking drugs in violation of the Maritime Drug Law Enforcement Act (MDLEA).[95] The defendant invoked the Fifth Amendment's Due Process Clause to contest the application of the statute to his extraterritorial conduct. After upholding Congress's authority to define and punish such conduct on the high seas under Article I, Section 8 of the Constitution, the Ninth Circuit, without any analysis as to why the Fifth Amendment granted the defendant due process rights, assessed whether the application of the statute to the defendant was consistent with due process.[96] The Court—clearly invoking the language of *Allstate* without acknowledging it expressly—determined that "[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States . . . so that such application would not be arbitrary or fundamentally unfair."[97] In a footnote, the Court added that international law principles may be useful as a "rough guide" of whether a sufficient nexus to the United States exists.[98] However, because the facts showed that the defendant intended to distribute the drugs in the United States, the Court determined without any reference to international law that a sufficient nexus existed such that the application of the MDLEA to Davis did not violate the Fifth Amendment's Due Process Clause.[99]

In laying out its due process test, the Ninth Circuit did not, as Professors Brilmayer and Norchi would have liked, articulate any distinction between its inquiry into the defendant's contact with the United States and its inquiry into fairness to the

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[94] *See* Colangelo, *supra* note 23, at 162 (describing the Ninth Circuit's decision in *United States v. Davis* as "the case that seems to have spawned the recent Fifth Amendment due process jurisprudence in this area . . . ."). Although the *Davis* Court cited its nexus test to *United States v. Peterson*, 812 F.2d 486 (9th Cir. 1987), a case in which the Ninth Circuit affirmed Congress's ability to proscribe drug trafficking in international waters, the *Peterson* Court did not actually consider a due process claim. Instead, the Court merely analyzed Congress's ability to proscribe the extraterritorial conduct in question. *See* Peterson, 812 F.2d at 493 ("We also reject appellants' argument that [the U.S. anti-drug trafficking statute], so construed, is an improper and unconstitutional exercise of extraterritorial jurisdiction. We conclude that there was more than a sufficient nexus with the United States to allow the exercise of jurisdiction. There was substantial evidence that the drugs were bound ultimately for the United States. Where an attempted transaction is aimed at causing criminal acts within the United States, there is a sufficient basis for the United States to exercise its jurisdiction to arrest and try the offenders."); *see also* Dan E. Stigall, *International Law and Limitations on the Exercise of Extraterritorial Jurisdiction in U.S. Domestic Law*, 35 HASTINGS INT'L & COMP. L. REV. 323, 348 (2012).

[95] United States v. Davis, 905 F.2d 245, 247 (9th Cir. 1990).

[96] *Id.* at 248 (" . . . as a matter of constitutional law, we require that application of the statute to the acts in question not violate the due process clause of the fifth amendment [*sic*].").

[97] *Id.* at 248–49 (citations omitted).

[98] *Id.* at 249 n.2 ("International law principles may be useful as a rough guide of whether a sufficient nexus exists between the defendant and the United States so that application of the statute in question would not violate due process. However, danger exists that emphasis on international law principles will cause us to lose sight of the ultimate question: would application of the statute to the defendant be arbitrary or fundamentally unfair?").

[99] *Id.* at 249.

defendant; instead, in determining the fairness of the extraterritorial application of U.S. law to the defendant, the Ninth Circuit's approach seemed to more closely track the *Allstate* standard by looking to the United States' contacts with the controversy and its interests arising from those contacts. Although the Ninth Circuit has not abandoned this standard, in the years since *Davis* it has explained that the nexus test serves the same purpose as the minimum contacts test in personal jurisdiction analysis because it ensures that only foreign nationals who should reasonably anticipate being haled into U.S. court are subjected to the extraterritorial application of U.S. law.[100] Moreover, the Ninth Circuit has held that jus cogens crimes subject to universal jurisdiction are an exception to the *Davis* nexus standard because the universal condemnation of such conduct "puts [the offender] on notice that his acts will be prosecuted by any state where he is found."[101]

2. Second Circuit

The Second Circuit first confronted the question of the due process limitations on federal choice of law in the prosecution of Ramzi Yousef, a Pakistani national who had orchestrated the 1993 World Trade Center bombing, on conspiracy charges for a 1995 plot to bomb several U.S. airlines flying out of Manila.[102] In *United States v. Yousef*, Yousef and his alien co-defendants challenged the application to their overseas conduct of several provisions of a federal law proscribing attempts to destroy aircraft in foreign air commerce.[103] After affirming Congress's authority to proscribe such extraterritorial conduct on both treaty and customary international legal grounds,[104] the Second Circuit—without analyzing why or how the Fifth Amendment recognizes the extraterritorial due process rights of foreign nationals—endorsed the Ninth Circuit's *Davis* nexus test as the appropriate standard for determining whether the application of the statute was arbitrary

[100] *See* United States v. Klimavicius-Viloria, 144 F.3d 1249, 1257 (9th Cir. 1998) ("The nexus requirement serves the same purpose as the 'minimum contacts' test in personal jurisdiction. It ensures that a United States court will assert jurisdiction only over a defendant who 'should reasonably anticipate being haled into court" in this country.'") (quoting World–Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)); *see also* United States v. Zakharov, 468 F.3d 1171, 1177 (9th Cir. 2006) ("Nexus is a constitutional requirement analogous to 'minimum contacts' in personal jurisdiction analysis . . . ").

[101] United States v. Shi, 525 F.3d 709, 723 (9th Cir. 2008). This exception to the nexus requirement for crimes subject to universal jurisdiction is also endorsed by Professors Brilmayer and Norchi. *See* Brilmayer and Norchi, *supra* note 53, at 1254. Most significantly, this exception to the nexus test in the Ninth Circuit has allowed the United States to apply the MDLEA extraterritorially to flagless vessels trafficking narcotics. *See, e.g.*, United States v. Caicedo, 47 F.3d 370, 373 (9th Cir.1995) (holding that due process did not require a nexus to extraterritorially prosecute alien defendants under the MDLEA who were trafficking narcotics on a flagless vessel in international waters because they were on notice that any state could prosecute them for their universally condemned conduct); United States v. Juda, 46 F.3d 961, 967 (9th Cir. 1995) (rejecting the due process claim of an alien prosecuted extraterritorially under the MDLEA because the United States does not require any nexus to extraterritorially regulate the crimes of stateless vessels on the high seas).

[102] Yousef, 327 F.3d at 79; *see* Stigall, *supra* note 94, at 352.

[103] 18 U.S.C.A. § 32.

[104] Specifically, the Second Circuit cited the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, to which the United States is a party, and the protective principle of extraterritorial prescriptive jurisdiction as bases for the United States to apply the statute overseas. *See* Yousef, 327 F.3d at 108–11.

or fundamentally unfair.[105] In evaluating nexus, the Second Circuit's analysis turned on the fact that the alien defendants had conspired to attack a dozen U.S.-flagged aircraft for the purpose of injuring Americans and influencing U.S. foreign policy. "Given the substantial intended effect of their attack on the United States and its citizens," the Court reasoned, "it cannot be argued seriously that the defendants' conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair."[106] Therefore, the Second Circuit held that the prosecution did not offend the Fifth Amendment's Due Process Clause. The Second Circuit has continued to apply this nexus standard in the years since *Yousef*, including in prosecutions of foreign nationals for providing material support to terrorism.[107]

3. Fourth Circuit

The Fourth Circuit is the most recent to have adopted the nexus standard in extraterritorial prosecutions of foreign nationals.[108] In *United States v. Brehm*, the Fourth Circuit was confronted with a due process challenge by a South African national who was prosecuted under the Military Extraterritorial Jurisdiction Act for stabbing a British national on a U.S. military base in Afghanistan.[109] The Fourth Circuit, like the Second and Ninth circuits before it, assumed without offering support or analysis that the protections of the Fifth Amendment's Due Process Clause extend to alien defendants in extraterritorial prosecutions.[110] Moreover, the Fourth Circuit endorsed the nexus due process approach of *Davis* and *Yousef* as the appropriate standard for determining whether the extraterritorial application of U.S. law to the defendant was arbitrary or fundamentally unfair. Although the Fourth Circuit recognized that, in contrast to the defendants in *Davis* and *Yousef*, Brehm did not target his conduct towards the United

[105] *Id.* at 111 ("Our Circuit has not yet decided the extent to which the Due Process Clause limits the United States' assertion of jurisdiction over criminal conduct committed outside our borders. The Ninth Circuit has held [in *Davis*] that '[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair' . . . . We agree.") (citation omitted); *see* Colangelo, *supra* note 23, at 163 (discussing the Second Circuit's adoption of the *Davis* standard in *Yousef*); *see also* Stigall, *supra* note 94, at 354.

[106] Yousef, 327 F.3d at 112.

[107] *See, e.g.*, Stigall, *supra* note 94, at 355 ("This approach by the Second Circuit has remained constant, requiring a nexus between the defendant and the United States in order for the assertion of jurisdiction to satisfy due process."); United States v. Al Kassar, 660 F.3d 108, 118 (2d Cir. 2011) ("In order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair").

[108] The Fourth Circuit first confronted the question of the extraterritorial due process rights of alien defendants in an unpublished opinion, United States v. Mohammad-Omar, 323 F. App'x 259, 260 (4th Cir. 2009), which does not have binding precedential effect in the Fourth Circuit. *Mohammad-Omar* involved the prosecution of a foreign national for trafficking drugs overseas but with intent of distributing them in the United States. The Fourth Circuit, citing *Davis* and *Yousef*, affirmed that the defendant's prosecution was consistent with due process because his intent to distribute narcotics in the United States created a sufficient nexus such that his prosecution was neither arbitrary nor fundamentally unfair. *Id.* at 261.

[109] United States v. Brehm, 691 F.3d 547 (4th Cir. 2012).

[110] *Id.* at 552 ("Though a criminal statute having extraterritorial reach is declared or conceded substantively valid under the Constitution, its enforcement in a particular instance must comport with due process.").

States, the Court found that, because Brehm's actions occurred on a U.S. military base while he was working under contract with the U.S. military, his conduct affected significant U.S. interests, including restoring law and order on the base, maintaining military discipline, and reallocating resources to confine Brehm, provide medical attention to his victim, and investigate the incident.[111] The Fourth Circuit found this U.S. nexus sufficiently close that prosecuting Brehm under U.S. law was neither arbitrary nor fundamentally unfair and, therefore, was consistent with the Due Process Clause of the Fifth Amendment.[112]

B. The Notice Test

1. Third Circuit

After the Ninth Circuit's *Davis* decision, the Third Circuit was the next to address the due process limitations on federal choice of law in extraterritorial prosecutions of foreign nationals. In *United States v. Martinez-Hidalgo*, a Colombian national who was prosecuted under the MDLEA after the U.S. Coast Guard found cocaine on his flagless vessel in international waters invoked the Fifth Amendment's Due Process Clause to challenge the application of the U.S. statute to his conduct.[113] Although the Third Circuit, like the Ninth, assumed without further explanation that, to comport with the Fifth Amendment's Due Process Clause, the extraterritorial application of U.S. law to a foreign national must be neither arbitrary nor fundamentally unfair, the Third Circuit declined to follow *Davis*' nexus approach.[114] Instead, the Third Circuit seemed to implicitly invoke the concept of notice based on customary international legal principles of prescriptive jurisdiction by reasoning that the application of MDLEA to the alien defendant was not fundamentally unfair because "the trafficking of narcotics is condemned universally by law-abiding nations."[115] The Third Circuit suggested that a nexus to the United States might be required if the prescribed conduct were "generally lawful throughout the world"—presumably, although the Court did not say so expressly, because a foreign national would lack notice of the unlawfulness of his extraterritorial conduct under U.S. law—but the Court declined to decide that issue in *Martinez-Hidalgo*.[116]

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[111] *Id.* at 552–53.
[112] *Id.* at 554.
[113] United States v. Martinez-Hidalgo, 993 F.2d 1052, 1053 (3d Cir. 1993).
[114] *Id.* at 1056 ("We further acknowledge that our conclusion that the government need not establish a domestic nexus to prosecute offenses under the Maritime Drug Law Enforcement Act is not reconcilable with some of the wording in the opinion of the Court of Appeals for the Ninth Circuit in *United States v. Davis* . . . . We decline to follow *Davis* . . .").
[115] *Id.* Note that although the Third Circuit's description of drug tracking as conduct "condemned universally by law-abiding nations" evokes the concept of universal jurisdiction, the category of crimes subject to universal jurisdiction is quite restrictive and it is doubtful that drug trafficking is included. *See, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 404 (1987) ("A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . .").
[116] Martinez-Hidalgo, 993 F.2d at 1056 (" . . . we acknowledge that there might be a due process problem if Congress provided for the extraterritorial application of United States law to conduct on the high seas without regard for a domestic nexus if that conduct were generally lawful throughout the world. But that is

The Third Circuit reaffirmed this relatively ill-defined approach in *United States v. Perez-Oviedo* when it rejected the due process claims of a foreign national who was charged under the MDLEA after his Panamanian-flagged vessel was stopped by the U.S. Coast Guard in international waters.[117] In evaluating whether the application of MDLEA to the defendant was arbitrary or fundamentally unfair, the Third Circuit, citing *Martinez-Hidalgo*, once again noted that drug trafficking is universally condemned, thereby implying that the defendant had notice that his conduct would subject him to prosecution in *some* jurisdiction.[118] Moreover, the Third Circuit viewed the defendant's due process claims as particularly weak because, in contrast to the defendant in *Martinez-Hidalgo* who was stopped on a stateless vessel, the Government of Panama had consented to the U.S. Coast Guard's boarding of the defendant's Panamanian-flagged vessel. Adopting the (questionable) position that consent of the flagged nation gives the United States prescriptive extraterritorial jurisdiction under the territorial principle of customary international law, the Third Circuit held that the application of MDLEA to the alien defendant was neither arbitrary nor fundamentally unfair and, therefore, was consistent with the Fifth Amendment's Due Process Clause.[119]

2. First Circuit

The First Circuit has adopted a similar approach to the extraterritorial due process rights of foreign nationals as the Third Circuit, but it is more explicit in looking to international legal principles of prescriptive jurisdiction to determine if the alien defendant had notice that the United States could prosecute him for his extraterritorial conduct.[120] The First Circuit initially articulated this standard in *United States v. Cardales*, a case in which Venezuelan nationals transporting narcotics on a Venezuelan-flagged vessel in international waters were arrested by the U.S. Coast Guard and prosecuted under the MDLEA.[121] The defendants appealed their convictions on the grounds that, because their conduct had no nexus to the United States, prosecuting them under U.S. law violated the Fifth Amendment's Due Process Clause.[122]

The First Circuit endorsed *Davis'* proposition that, to be consistent with due process, an extraterritorial application of U.S. can be neither arbitrary nor fundamentally unfair, but, like the Third Circuit, it expressly declined to adopt the Ninth Circuit's nexus

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not the situation here."); *see* Stigall, *supra* note 94, at 366 ("The holding [of *Martinez-Hidalgo*] clearly envisions that a nexus could be required under certain circumstances, but that, in the absence of a nexus, other factors (in this case, the 'universal' condemnation of the offense at issue) could make a detached exercise of jurisdiction acceptable.").

[117] United States v. Perez-Oviedo, 281 F.3d 400, 401 (3d Cir. 2002).

[118] *Id.*

[119] *Id.* at 403 ("Perez-Oviedo's state of facts presents an even stronger case for concluding that no due process violation occurred. The Panamanian government expressly consented to the application of the MDLEA (unlike the stateless vessel in *Martinez–Hidalgo*). Such consent from the flag nation eliminates a concern that the application of the MDLEA may be arbitrary or fundamentally unfair.").

[120] Stigall, *supra* note 94, at 360.

[121] United States v. Cardales, 168 F.3d 548, 551 (1st Cir. 1999).

[122] *Id.* at 552.

requirement.[123] Instead, the First Circuit, citing to *Davis*' footnote, reasoned that principles of international law should guide whether due process is satisfied.[124] Because the Venezuelan government had consented to the U.S. Coast Guard's boarding of the vessel, and because the Court reasoned that narcotics trafficking presents a threat to U.S. national security, the First Circuit determined that the application of U.S. law to the defendants was justified by international law—specifically, the territorial and protective principles of extraterritorial prescriptive jurisdiction.[125] Therefore, in the First Circuit's view, there had been no violation of the defendants' due process rights.[126] Although the First Circuit did not say so expressly, the implication seemed to be that, because customary international bases of prescriptive jurisdiction give foreign nationals fair warning that the United States can regulate their extraterritorial conduct, there is nothing arbitrary or fundamentally unfair about prosecuting them under U.S. law. This position has been controversial, but the First Circuit continues to use it in lieu of a nexus requirement.[127]

3. Fifth Circuit

The Fifth Circuit's approach to the extraterritorial due process rights of alien defendants is particularly opaque, but nonetheless seems to turn on whether the defendant had some form of notice that the United States could prosecute him for his extraterritorial conduct. In *United States v. Suerte*, a Philippine national was prosecuted under the MDLEA for conspiracy to distribute cocaine after his Maltese-flagged vessel was stopped by the U.S. Coast Guard in international waters.[128] The case was one of first impression for the Fifth Circuit, but the Court adopted the arbitrary or fundamentally unfair standard of *Davis* without conducting its own analysis because the government and defendant both agreed that it was the appropriate standard.[129] However, the Fifth Circuit declined to adopt *Davis*' nexus test because, after consulting the history of the Piracies

[123] *Id.* at 553 ("We decide today that due process does not require the government to prove a nexus between a defendant's criminal conduct and the United States in a prosecution under the MDLEA when the flag nation has consented to the application of United States law to the defendants.").
[124] *Id.* (citing *Davis*, 905 F.2d at 249 n.2).
[125] *Id.* The First Circuit's reasoning and application of international law in *Cardales* has been criticized. *See* United States v. Angulo-Hernandez, 576 F.3d 59, 59 (1st Cir. 2009) (Torruella, J., dissenting from denial of rehearing en banc) ("These conclusions are both suspect. The consent of the flag nation is not material to a due process analysis focused on our government's power over a foreign individual defendant. And the protective principle is simply inapplicable on these facts."); Stigall, *supra* note 94, at 360 ("Both of these positions are questionable under established principles of international law.").
[126] Cardales, 168 F.3d at 553.
[127] *See, e.g.*, Angulo-Hernandez, 576 F.3d at 62 (Torruella, J., dissenting from denial of rehearing en banc) (arguing that "compliance with international law is necessary but not sufficient" for due process and that, instead, the First Circuit should adopt the Ninth Circuit's nexus standard, which is more analogous to the minimum contacts test of *Int'l Shoe Co. v. Washington*).
[128] United States v. Suerte, 291 F.3d 366, 367 (5th Cir. 2002). Although *Suerte* was not the first case in the Fifth Circuit to raise questions regarding the extraterritorial due process rights of alien defendants, *see* United States v. Alvarez-Mena, 765 F.2d 1259 (5th Cir. 1985) (upholding the application of the MDLEA's predecessor, 21 U.S.C.A. § 955, to alien defendants caught transporting narcotics in international waters by the U.S. Coast Guard), *Suerte* was the first case where the Fifth Circuit actually engaged in a due process inquiry, rather than a mere analysis of Congress's power to proscribe extraterritorial conduct.
[129] Suerte, 291 F.3d at 377.

and Felonies Clause, the Court concluded that the Fifth Amendment's Due Process Clause does not impose any nexus requirement on statutes proscribing felonies on the high seas, like the MDLEA.[130]

The Fifth Circuit went on to explain that, assuming *arguendo* that the due process inquiry required the Court to consult international law, the United States did not need any nexus to prosecute the defendant consistent with the Fifth Amendment's Due Process Clause.[131] First, the Court found that Malta, by consenting to the Coast Guard's boarding of the vessel and the United States' prosecution of the defendant under the MDLEA, had waived any international legal objection to the extraterritorial application of U.S. law. Second, by looking to Congress's findings in the MDLEA and to the purposes of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the Court, in an apparent allusion to the universal and protective principles of prescriptive jurisdiction, found that drug trafficking is universally condemned and constitutes a serious threat to U.S. security.[132] Thus, the Fifth Circuit held that the application of the MDLEA to the alien defendant was neither arbitrary nor fundamentally unfair because "[t]hose subject to its reach are on notice."[133]

4. Eleventh Circuit

The Eleventh Circuit's approach to the due process limitations on federal choice of law in extraterritorial prosecutions of foreign nationals also turns on whether international legal principles provide the United States with a basis to apply its laws extraterritorially, but the Eleventh Circuit has offered little explanation of the reasoning behind its approach.[134] The Eleventh Circuit first confronted this issue in *United States v. Ibarguen-Mosquera*, where foreign nationals who were arrested by the U.S. Coast Guard for transporting cocaine in a flagless semi-submersible vessel off the coast of Colombia challenged their prosecution under the Drug Trafficking Vessel Interdiction Act (DTVIA) on due process grounds.[135] The Eleventh Circuit, without more explanation than citing to the First Circuit's decision in *Cardales*, declared that to comply with due process the extraterritorial application of U.S. law to a foreign national must be neither arbitrary nor fundamentally unfair.[136] Like the First Circuit, the Eleventh Circuit rejected the defendants' claim that due process requires a nexus between their conduct and the United States because, as the Eleventh Circuit reasoned, international law permits any nation to subject stateless vessels to its jurisdiction since they are "international pariahs" with no internationally-recognized right to navigate freely on the high seas.[137] For this reason, the

[130] *Id.* at 375 (" . . . we hold that, for the MDLEA issue at hand, and to the extent the Due Process Clause may constrain the MDLEA's extraterritorial reach, that clause does not impose a nexus requirement, in that Congress has acted pursuant to the Piracies and Felonies Clause."); *see* Colangelo, *supra* note 23, at 174 (discussing *Suerte*'s treatment of the history of the Piracy and Felonies Clause).
[131] Suerte, 291 F.3d at 375.
[132] *Id.* at 377.
[133] *Id.*
[134] Stigall, *supra* note 94, at 362.
[135] United States v. Ibarguen-Mosquera, 634 F.3d 1370 (11th Cir. 2011).
[136] *Id.* at 1378.
[137] *Id.* at 1379.

Court held that there was nothing arbitrary or fundamentally unfair about prosecuting the defendants under U.S. law.[138] Although the Eleventh Circuit did not explain why compliance with international law is sufficient to ensure that the extraterritorial application of U.S. law does not violate due process, the Court's implicit assumption seemed to be that international law gives all individuals fair warning that the United States could prosecute them for their conduct overseas.

C. The Driving Factors Behind the Circuit Split

The seven circuits that have addressed this question unanimously agree that, in order to be consistent with Fifth Amendment's Due Process Clause, the extraterritorial application of U.S. law to a foreign national cannot be arbitrary or fundamentally unfair. The difference, then, is how courts should evaluate arbitrariness and fairness. Amidst the hazy reasoning of some of the circuits, one can discern the following trends: The approach of the three nexus test circuits—the Second, Fourth, and Ninth—seems truer to the Supreme Court's *Allstate Ins. Co. v. Hague* state choice of law standard because they ensure fundamental fairness by looking to the United States' connections to the defendant's conduct and U.S. interests arising from those contacts. By contrast, the notice test circuits—the First, Third, Fifth, and Eleventh—tend to treat fundamental fairness to the defendant as an inquiry independent of the United States' contacts with, and interests arising from, the defendant's conduct. They therefore look to whether international law provided the defendant with fair warning that the United States could regulate his extraterritorial conduct.[139] This approach appears to be driven by courts' concern for the principle of legality—the idea that laws must be ascertainable and non-retroactive in order to give individuals fair warning of what conduct is prohibited.[140] The notice test, therefore, seems closer to *Home Ins. Co. v. Dick* and the model envisioned by Professors Brilmayer and Norchi than the state-centric choice of law approach of *Allstate*.[141]

Of course, the general confusion over due process limitations on the extraterritorial application of U.S. law means that the lines between these tests are not always entirely clear. The Ninth Circuit, for instance, has compared the nexus inquiry to the minimum contacts test in personal jurisdiction analysis because both, according to the Ninth Circuit, are concerned with ensuring that only alien defendants who should reasonably anticipate being haled into U.S. court are subjected to U.S. law.[142] Moreover,

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[138] *Id.* ("Because extraterritorial jurisdiction is proper, we conclude that the enactment of the DTVIA does not offend the Due Process Clause of the Constitution."). Presumably, the Court meant to refer to the DTVIA's application to the defendants, rather than the statute's enactment, since due process requires an inquiry into the specific application of what might otherwise be a constitutional statute. The imprecision of the Eleventh Circuit's phrasing here once again highlights the significant confusion in the circuits over how due process applies in extraterritorial prosecutions of foreign nationals.

[139] Colangelo, *supra* note 23, at 165.

[140] *Id.* at 166.

[141] Note that Professors Brilmayer and Norchi argued that notice, in and of itself, was insufficient for due process purposes, although they were most likely referring to notice from the United States, rather than notice from principles of international law. *See* Brilmayer and Norchi, *supra* note 53, at 1243.

[142] *See* Klimavicius-Viloria, 144 F.3d at 1249 (explaining that the nexus inquiry, like the minimum contacts test in personal jurisdiction, ensures that a U.S. court will only assert jurisdiction over a foreign national

the Ninth Circuit's carve out for crimes subject to universal jurisdiction suggests that the concept of notice might be an implicit factor driving the nexus test.[143] At least one commentator has gone so far as to argue that the nexus test is actually a variation of the notice test because, in looking to whether a foreign national voluntarily affiliated himself with the United States by committing an extraterritorial act that did, does, or will have some impact on the United States, the nexus test ensures that the alien defendant had fair warning that the United States could prosecute him for his conduct.[144] Nonetheless, as Part IV demonstrates, a comparison of the outcome of the defendants' due process claims in *United States v. Ahmed* under the nexus and notice tests suggests that these standards are distinct and that they can produce different results for the same due process claim in different jurisdictions.

IV. Evaluating these Competing Standards through the Prism of *United States v. Ahmed*

If the alien defendants in *United States v. Ahmed* invoke the Fifth Amendment's Due Process Clause, it will be the first case in which a court is forced to decide if the United States can extraterritorially prosecute foreign nationals for providing material support to terrorism where that support is not directed at the United States or U.S. nationals.[145] In light of the circuit split over the appropriate choice of law test, the outcome of the defendants' due process claims will probably depend on whether the District Court of the Eastern District of New York applies the nexus or notice test. If the District Court follows Second Circuit precedent and applies the nexus test, as is likely, it will probably find a sufficient connection between U.S. national security interests and the defendants' extraterritorial conduct. However, if the District Court forgoes precedent and applies the notice test, the Court might find that the defendants had no fair warning that the United States could regulate their extraterritorial conduct because international law does not recognize a basis for the United States to regulate material support to terrorism that is not directed at the United States or U.S. nationals. This divergence in outcomes raises serious questions about how courts should protect the due process rights of foreign nationals in extraterritorial 18 U.S.C. § 2339B prosecutions.[146]

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who should reasonably anticipate being haled into court in the United States); Zakharov, 468 F.3d at 1177 (comparing the nexus requirement to minimum contacts in personal jurisdiction analysis).

[143] *See, e.g.*, Shi, 525 F.3d at 723 ("Due process does not require a nexus between such an offender and the United States because the universal condemnation of the offender's conduct puts him on notice that his acts will be prosecuted by any state where he is found.").

[144] *See* Colangelo, *supra* note 23, at 166 (arguing that the nexus requirement merely functions to ensure that the criteria of the notice inquiry are met); Al Kassar, 660 F.3d at 119 ("The idea of fair warning is that 'no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'") (quoting Bouie v. City of Columbia*,* 378 U.S. 347, 351 (1964)).

[145] *See generally* Kontorovich, *The Offenses Clause*, *supra* note 2.

[146] An interesting question, but one that is probably beyond the scope of this paper, is whether the State of New York could prosecute the defendants consistent with due process, assuming their extraterritorial conduct was covered by New York's Anti-Terrorism Act. In contrast to the outcome under the nexus test in the federal context, the defendants in a hypothetical *The People of the State of New York v. Ahmed* would have a much better chance of prevailing on the due process question because New York State lacks the United States' contacts with, and interests arising from, the defendants' extraterritorial conduct. In contrast to the federal government, the State of New York has no national defense, foreign relations, or economic interest in the stability of the Government of Somalia or the Horn of Africa. Moreover, the State of New York could not analogize to the reasoning of *Holder v. Humanitarian Law Project* because there is no

A. United States v. Ahmed *under the Nexus Test*

Despite the fact that the defendants in *United States v. Ahmed* neither directed, nor intended to direct, their material support towards the United States, the District Court will probably find that their support to al-Shabaab threatened, and thus created a nexus to, U.S. national security interests such that the extraterritorial application of 18 U.S.C. § 2339B to their case is consistent with the Fifth Amendment's Due Process Clause. The Second Circuit has held that, for due process purposes, a nexus may exist when the aim of a foreign national's conduct abroad is to cause harm inside the United States or harm to U.S. citizens or interests.[147] Another nexus test jurisdiction, the Fourth Circuit, has held that even if an alien does not target his extraterritorial conduct towards the United States, that conduct may still affect significant U.S. interests such that a sufficient nexus exists for due process purposes.[148] This reasoning could help the District Court find a nexus in *United States v. Ahmed* because, in designating al-Shabaab as a foreign terrorist organization, the Secretary of State has certified that the group "threatens the security of U.S. nationals or the national security (national defense, foreign relations, or the economic interests) of the United States."[149] For instance, al-Shabaab's attacks against the Transitional Federal Government of Somalia[150] and the African Union Mission in Somalia threaten the United States' foreign relations interest in the stability of Somalia.[151] Moreover, as its repeated terror attacks in Kenya and Uganda demonstrate,

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evidence that providing material support to al-Shabaab in its fight against the Government of Somalia frees up resources that will be used against New York specifically (despite the fact that there is evidence that this material support frees up resources to be used against the United States more broadly). Even if a court were to apply the notice test in a hypothetical *The People of the State of New York v. Ahmed*, so long as the defendants never directed nor intended to direct their conduct towards New York, they would always prevail on the due process question because they lacked notice. After all, because New York State is not a sovereign state in the international system, it has no jurisdiction to proscribe extraterritorial conduct under international law and, therefore, foreign nationals with no connection to New York could never be put on notice that New York State could prosecute them for their overseas conduct. Of course, all of this assumes that a court would apply the *Allstate* standard. In fact, since the Full Faith and Credit Clause would not be at play, it would be more appropriate for the court to look to *Home Ins. Co. v. Dick* in analyzing due process, which—given *Dick*'s concern about the reasonable expectations of defendants—would make the defendants in a hypothetical *The People of the State of New York v. Ahmed* even more likely to prevail.

[147] Al Kassar, 660 F.3d at 118.

[148] Brehm, 691 F.3d at 552 (holding that, even though the alien defendant did not target his violent conduct towards the United States, a sufficient nexus existed for due process purposes because the alien's actions, which took place on a U.S. military base while he was working under a contract with the U.S. military, affected significant U.S. interests on the base).

[149] U.S. Dep't of State, "Foreign Terrorist Organizations," *supra* note 10 (describing the legal criteria for the designation of a foreign terrorist organization under § 219 of the Immigration and Nationality Act); U.S. Dep't of State, Office of the Coordinator for Counterterrorism, "Designation of al-Shabaab as a Foreign Terrorist Organization," Feb. 26, 2008, http://www.state.gov/j/ct/rls/other/des/102446.htm.

[150] At the time that the defendants in *United States v. Ahmed* were apprehended, the Transitional Federal Government (TFG) was the interim authority in Somalia. However, the Federal Government of Somalia officially succeeded the TFG in August 2012. *See* CIA World Factbook, "Somalia: Introduction," June 23, 2014, https://www.cia.gov/library/publications/the-world-factbook/geos/so.html.

[151] *See, e.g.*, Testimony of Assistant Secretary of State for African Affairs Linda Thomas-Greenfield, Senate Foreign Relations Committee, Subcommittee on African Affairs, Oct. 3, 2013, http://www.foreign.senate.gov/imo/media/doc/Thomas-Greefield_Testimony.pdf ("Our primary interest in

al-Shabaab's conduct threatens broader U.S. foreign relations interests in the regional stability of the Horn of Africa.[152] Consequently, the District Court will probably find that by providing material support to al-Shabaab—even support that was only intended to help al-Shabaab fight foreign governments on foreign soil—the extraterritorial conduct of the defendants affected significant U.S. interests, which created a nexus to the United States.

The District Court might also look to the Supreme Court's reasoning in *Holder v. Humanitarian Law Project* to conclude that the defendants' material support to al-Shabaab threatened U.S. national security by freeing up other al-Shabaab resources that could be directed against the United States. In *Humanitarian Law Project*, the Court held that 18 U.S.C. § 2339B's prohibition against providing non-violent material support to designated foreign terrorist organizations did not violate the First Amendment's Free Speech Clause.[153] The Court's reasoning relied, in part, on the Executive Branch's determination that any support to a designated foreign terrorist organization threatens the United States because terrorist groups are structurally and organizationally fluid.[154] As the Court noted, "The [Executive's submissions] shows that designated foreign terrorist organizations do not maintain organizational firewalls between social, political, and terrorist operations, or financial firewalls between funds raised for humanitarian activities

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Somalia is to help the people of Somalia build a peaceful nation with a stable government, able to ensure civil security and services for its citizens. This in turn will prevent terrorists from using Somali territory as a safe haven."); U.S. Africa Command, Somalia (accessed July 6, 2014) http://www.africom.mil/africa/east-africa/somalia ("U.S. foreign policy objectives in Somalia are to promote political and economic stability, prevent the use of Somalia as a haven for international terrorism, and alleviate the humanitarian crisis caused by years of conflict, drought, flooding, and poor governance."); Testimony of Principal Deputy Assistant Secretary of State for African Affairs Donald Yamamoto, Senate Foreign Relations, Subcommittee on African Affairs, Aug. 3, 2011, http://www.state.gov/p/af/rls/rm/2011/169505.htm ("Al-Shabaab is a U.S.-designated foreign terrorist organization and has also been sanctioned by the United Nations for its role in threatening the peace, security, and stability of Somalia including disrupting the Djibouti Peace Process . . ."); U.S. Dep't of State Fact Sheet, U.S. Assistance in Somalia (May 7, 2013), http://www.state.gov/r/pa/prs/ps/2013/05/209062.htm (explaining that U.S. assistance to Somalia "aims to help develop a stable government; ensure Somalia is not a safe-haven for terrorists; respond to and mitigate humanitarian crises; combat piracy; and prevent instability in Somalia from destabilizing the region.").

[152] *See* U.S. National Counterterrorism Center, "Al-Shabaab," (accessed July 6, 2014), http://www.nctc.gov/site/groups/al_shabaab.html (discussing al-Shabaab terror attacks in Kenya and Uganda); *see also* Jeffrey Gettleman and Nicholas Kulish, *Gunmen Kill Dozens in Terror Attack on Kenya Mall*, N.Y. TIMES, Sept. 21, 2013, http://www.nytimes.com/2013/09/22/world/africa/nairobi-mall-shooting.html; *Al-Shabab claims new deadly attack in Kenya*, AL JAZEERA, June 17, 2014, http://www.aljazeera.com/news/africa/2014/06/al-shabab-claims-new-deadly-attack-kenya-201461782915271188.html; Yamamoto Testimony, *supra* note 151, ("In the long term, regional security in the Horn of Africa requires political stability in Somalia.").

[153] Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[154] *Id.* at 33 ("The State Department informs us that '[t]he experience and analysis of the U.S. government agencies charged with combating terrorism strongly suppor[t]' Congress's finding that all contributions to foreign terrorist organizations further their terrorism . . . . In the Executive's view: 'Given the purposes, organizational structure, and clandestine nature of foreign terrorist organizations, it is highly likely that any material support to these organizations will ultimately inure to the benefit of their criminal, terrorist functions—regardless of whether such support was ostensibly intended to support non-violent, non-terrorist activities.'") (citations omitted).

and those used to carry out terrorist attacks."[155] Thus, the Court concluded that even non-violent material support to terrorist organizations frees up other resources that could be put to violent ends.[156] Similarly, federal prosecutors could argue that the material support that the defendants in *United States v. Ahmed* provided to al-Shabaab—despite the fact that it was not directed against the United States or U.S. nationals—increased al-Shabaab's ability to target the United States and U.S. citizens by freeing up resources that otherwise would have been expended on al-Shabaab's fight against the Somali, Kenyan, and Ugandan governments. Even if the District Court were not entirely persuaded by this logic, it seems likely that the Court would defer to the Executive's primacy in national security affairs given the judiciary's long-standing practice of doing so and the general confusion surrounding the applicability of the Fifth Amendment's Due Process Clause to foreign nationals.[157]

B. United States v. Ahmed *under the Notice Test*

By contrast, if the District Court were to stray from Second Circuit precedent and instead evaluate the defendants' Fifth Amendment due process claims in *United States v. Ahmed* under the notice test, the defendants would have a much greater chance of prevailing. As Part III discussed, notice test jurisdictions like the First, Third, Fifth, and Eleventh circuits inquire into whether a foreign national should reasonably anticipate being prosecuted by the United States for his extraterritorial conduct, and these jurisdictions most often do so by looking to customary international principles of prescriptive jurisdiction. Here, the defendants could argue that—even though the scienter requirement of 18 U.S.C. § 2339B requires that they have knowledge that al-Shabaab is a designated terrorist organization or that it engages in terrorist activity or terrorism[158]—they could not have reasonably anticipated being subjected to U.S. law because customary international legal principles do not provide the United States with jurisdiction over their overseas material support to al-Shabaab. Without any intent to direct their conduct towards the United States or U.S. nationals, neither the territorial, the protective, nor the passive personality principles of prescriptive jurisdiction could have put the defendants on notice that the United States could regulate their extraterritorial material support to al-Shabaab. Although prosecutors could argue that certain acts of terrorism are jus cogens crimes subject to universal jurisdiction,[159] that position is disputed,[160] and,

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[155] *Id.* at 5.
[156] *Id.* at 30.
[157] *See, e.g.*, *Id.* at 33–34 ("Th[e] evaluation of the facts by the Executive, like Congress's assessment, is entitled to deference. This litigation implicates sensitive and weighty interests of national security and foreign affairs . . . . 'neither the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.' It is vital in this context 'not to substitute . . . our own evaluation of evidence for a reasonable evaluation by the Legislative Branch.'") (citations omitted).
[158] 18 U.S.C. § 2339B(a)(1).
[159] *See, e.g.*, Colangelo, *supra* note 23, at 176–77 (arguing that the United States can exercise universal jurisdiction to extraterritorially "proscribe [the] bombing [of] public places, infrastructure, transportation systems, airports and aircraft, as well as hijacking aircraft, hostage taking, and even financing terrorist organizations.").
[160] *See, e.g.*, Yousef, 327 F.3d at 106–08 (finding that there is no international consensus defining or proscribing terrorism).

regardless, there is no evidence that any such international prohibition extends to material support to terrorism, which the United States has criminalized to a degree unmatched by any other country.[161] Thus, if the District Court were to adopt the notice test of the First, Third, Fifth, or Eleventh Circuit, it might find that the extraterritorial application of 18 U.S.C. § 2339B to the defendants in *United States v. Ahmed* is arbitrary or fundamentally unfair and, therefore, violates the Fifth Amendment's Due Process Clause.

C. What United States v. Ahmed *Reveals about these Competing Standards*

As this analysis shows, an alien defendant in an extraterritorial 18 U.S.C. § 2339B prosecution in a nexus test jurisdiction will always be deemed to have a sufficient connection to the United States because the defendant provided material support to an organization that, by definition, threatens the security of U.S. nationals or the national defense, foreign relations, or economic interests of the United States.[162] This outcome raises serious questions about the ability of the nexus test to prevent arbitrary or fundamentally unfair applications of U.S. law overseas. While a foreign national who directs, or intends to direct, his extraterritorial conduct towards the United States should reasonably foresee the possibility of being prosecuted in U.S. court, it is difficult to imagine how every foreign supporter of an armed group in a foreign civil war could reasonably be aware that the group threatens the national defense, foreign relations, or economic interests of the United States because the United States has complex and cross-cutting strategic interests in every corner of the globe.

For instance, the young Sunni man in Aleppo who intends no harm to the United States, but in an effort to stop the Assad regime's indiscriminate attacks on his city, contributes a portion of his monthly income to the rebel group that controls his neighborhood, al-Nusra Front, has opened himself to liability under 18 U.S.C. § 2339B in nexus test jurisdictions. After all, the Secretary of State has designated al-Nusra Front as a terrorist organization and, therefore, any support he offers to the group frees up resources for it to use against the national defense, foreign relations, or economic interests of the United States.[163] By contrast, the young Sunni man on the other side of town, who also intends no harm to the United States but wants to stop Assad's attacks, does not risk U.S. prosecution for providing financial support to his neighborhood's rebel group, a faction loyal to the Free Syrian Army, because they are not a designated terrorist organization. In fact, the United States considers the success of the Free Syrian Army as

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[161] *See* Colangelo, *supra* note 23, at 177 (" . . . however, a theory of universal jurisdiction does not avoid constitutional restraints on federal extraterritoriality where the crime is not universal under international law. Thus, offenses that are not the subjects of widely held international prohibitions, like providing material assistance to, or receiving military training from a foreign terrorist organization, do not qualify as universal."); Urbelis, *supra* note 25, at 324 (arguing that "[b]ecause the offenses contained within [18 U.S.C.] sections 2339A, 2339B, and 2339C are an order removed from terrorist acts themselves, and because there does not exist anything even resembling a universal consensus about the definition of material support, in all likelihood the universality principle alone will not support extraterritorial jurisdiction over such offenses.").

[162] U.S. Dep't of State, "Foreign Terrorist Organizations," *supra* note 10; U.S. Dep't of State, "Designation of al-Shabaab as a Foreign Terrorist Organization," *supra* note 149.

[163] *See* U.S. Dep't of State, "Foreign Terrorist Organizations," *supra* note 10 (listing al-Nusra Front as a designated foreign terrorist organization).

being in its strategic interest.[164] However, to the two young men in Aleppo—poor, illiterate, and unschooled in the complicated realpolitik of U.S. strategy in the region—their actions and motivations are identical and, thus, the first man could not reasonably anticipate being prosecuted in the United States.

Similarly, the elderly Kurdish woman living outside Mosul, who voluntarily and regularly shelters fighters from the Kurdistan Workers' Party (PKK) traveling to the front to fight the Islamic State in Iraq and Syria (ISIS), is subject to prosecution under 18 U.S.C. § 2339B in a nexus test jurisdiction because the PKK is a designated terrorist organization.[165] Even though the woman never intended any harm to the United States, and knows that the fighters she is sheltering are attacking ISIS sites that the U.S. military is targeting from the air, her support to the PKK frees up resources that can be redirected against the national defense, foreign relations, or economic interests of the United States. By contrast, her friend on the other side of the village, another older Kurdish woman who does her part opposing ISIS by sheltering Kurdish volunteers fighting with the Pesh Merga, could not be prosecuted in the United States because those fighters do not belong to a designated terrorist organization. To these two uneducated women—who have never left their village let alone Nineveh Province—their contribution to the fight against ISIS is identical and, thus, the first woman could not reasonably anticipate being prosecuted in the United States.

While the entanglement of U.S. allies and adversaries in Syria and Iraq is particularly complex, these same types of scenarios can play out in civil wars from Somalia to Nigeria where designated terrorist organizations are fighting foreign governments and other foreign non-state actors. These examples show that, from the foreign national defendant's perspective, whether the United States happens to have a national defense, foreign relations, or economic interest in supporting the host government, the opposition, or—as in Syria—something in between, is more like a game of chance than a fact which he or she could reasonably ascertain. Such a watered down due process inquiry might assuage critics of extraterritorial due process, like Professor Weisburd, but if foreign nationals prosecuted for overseas conduct do have due process rights, as every circuit to address the question has agreed, it seems contradictory to protect these rights with a seemingly empty standard.

The hollowness of the nexus test is, in many ways, a product of the Supreme Court's *Allstate Ins. Co. v. Hague* standard, on which the three nexus test circuits have overly relied. As discussed in Part II, *Allstate*, in attempting to establish a state choice of law test consistent with the Due Process Clause and the Full Faith and Credit Clause, created a highly permissive standard that assesses whether an application of state law is arbitrary or fundamentally unfair by looking to the state's contacts with the controversy

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[164] *See, e.g.*, Ben Hubbard, Eric Schmitt, and Mark Mazzetti, *U.S. Pins Hope on Syrian Rebels With Loyalties All Over the Map*, N.Y. TIMES, Sept. 11, 2014, http://www.nytimes.com/2014/09/12/world/middleeast/us-pins-hope-on-syrian-rebels-with-loyalties-all-over-the-map.html (discussing the Obama Administration's determination to arm the Free Syrian Army in order to fight the Islamic State in Iraq and Syria and the Assad regime).

[165] *See* U.S. Dep't of State, "Foreign Terrorist Organizations," *supra* note 10 (listing the Kurdistan Workers' Party as a designated foreign terrorist organization).

and the state's interests arising from those contacts.[166] By contrast, the Supreme Court in *Home Ins. Co. v. Dick* suggested, at least indirectly, that courts should be more concerned about the expectations of the defendant than the interests of the regulating state when assessing whether an extraterritorial application of state law is consistent with the Due Process Clause.[167] Professors Brilmayer and Norchi similarly described "individual fairness" as its own inquiry independent of state contacts and state interests in their influential article, although they did so by drawing on *Allstate* rather than *Dick*.[168]

Unfortunately, even though the Full Faith and Credit Clause is not in play in the federal choice of law context, the Second, Fourth, and Ninth circuits have, like *Allstate*, evaluated fundamental fairness by assessing the state's contacts with, and interests arising from, the defendant's extraterritorial conduct, rather than by treating individual fairness as a separate inquiry. While this approach has been criticized for stressing state sovereignty interests at the expense of individual liberty in the state choice of law context, this paper's analysis of *United States v. Ahmed* demonstrates that *Allstate*'s emphasis on state interests is magnified in extraterritorial material support to terrorism prosecutions.[169] Where the security of the state is at issue, the state's interests arising from its contacts with the defendant's overseas conduct—however indirect or tangential that contact might be—take on paramount importance, which any individual defendant's liberty interests would be hard-pressed to overcome, especially when taking into consideration the judiciary's long-standing practice of deferring to the Executive Branch in national security affairs.[170]

By contrast, the notice test is more protective of the alien defendant's liberty interests and better ensures that extraterritorial applications of U.S. law are neither arbitrary nor fundamentally unfair. By looking to whether the foreign national received fair warning that the United States could prosecute him for his overseas conduct, the notice test emphasizes fairness to the individual who is subjected to the extraterritorial application of U.S. law, which is consistent with traditional conceptions of due process as an individual right and seems more or less in keeping with the Court's approach in *Dick*.[171] Admittedly, fair warning can be an elusive concept in extraterritorial prosecutions because, in contrast to an American citizen, a foreign national should not be reasonably expected to know and understand the strictures of U.S. law, at least no more so than an American citizen should be expected to know the law of other countries. However, customary international principles of extraterritorial prescriptive jurisdiction can serve as a proxy for notice because all persons—whatever citizenship they may hold

[166] Allstate, 449 U.S. at 313.
[167] Dick, 281 U.S. at 410.
[168] Brilmayer and Norchi, *supra* note 53, at 1243.
[169] *See, e.g.*, Fruehwald, *supra* note 76, at 56–57.
[170] *See, e.g.*, Boumediene, 553 U.S. at 797 (explaining the Court's duty to defer to the Executive in national security affairs); Hamdan v. Rumsfeld, 548 U.S. 557, 678 (2006) (Thomas, J., dissenting) (noting the Court's "well-established duty to respect the Executive's judgment in matters of military operations and foreign affairs.").
[171] Fruehwald, *supra* note 76, at 57.

and whatever country they may reside in—are subject to, and responsible for knowing their obligations under, international law.[172]

For instance, if the defendants in *United States v. Ahmed* had helped al-Shabaab attack a location in the United States, harm a U.S. national overseas, or bomb a civilian airliner abroad, the United States could prosecute them consistent with due process because the territorial and protective principles, the passive personality principle, and the universality principle, respectively, put the defendants on notice that the United States can exercise jurisdiction over their extraterritorial conduct. There would be nothing arbitrary or fundamentally unfair about applying U.S. law to the alien defendants in this manner because, like everyone else in the world, the defendants are responsible for knowing the consequences of their actions under international law. However, prosecuting the defendants for conduct that the United States does not have jurisdiction to regulate under international law—like providing material support to a designated foreign terrorist organization where there is no nexus to the United States—would be arbitrary or fundamentally unfair because the defendants would have had no fair warning that their conduct could subject them to U.S. prosecution. Thus, without notice, the extraterritorial prosecution of foreign nationals under 18 U.S.C. § 2339B is inconsistent with the Fifth Amendment's Due Process Clause.

Conclusion

The question of how to assess the due process claims of foreign nationals in extraterritorial 18 U.S.C. § 2339B prosecutions is one of growing significance. Recent events in Syria and Iraq notwithstanding, the Obama Administration continues to move away from an armed conflict paradigm with al-Qa'ida and its affiliates in favor of prosecuting suspected foreign terrorists in federal court. As a result, cases like *United States v. Ahmed* will become more common in the coming years. The Constitution's expansive grant of extraterritorial powers to Congress makes it highly unlikely that defendants in these prosecutions will succeed in facially challenging statutes like 18 U.S.C. § 2339B. Instead, they are more likely to succeed in arguing that the application of 18 U.S.C. § 2339B to their overseas conduct violates the Fifth Amendment's Due Process Clause. For this reason, it is critically important for courts to agree on an appropriate and uniform standard by which to judge these claims.

Unfortunately, there is a great deal of confusion in the circuits regarding the due process rights of foreign nationals in extraterritorial prosecutions. All seven circuits that have addressed this question agree that the protections of the Fifth Amendment's Due Process Clause extend to foreign nationals subjected to the extraterritorial application of U.S. law and, recalling the Supreme Court's *Allstate Ins. Co. v. Hague* standard, all seven have held that the application of U.S. law cannot be arbitrary or fundamentally unfair. However, the circuits disagree over how to evaluate arbitrariness and unfairness. The Second, Fourth, and Ninth circuits maintain that, except in cases of crimes subject to universal jurisdiction, there must be some nexus between the United States and the defendant's conduct for the United States to prosecute the defendant consistent with due

[172] *See generally* Colangelo, *supra* note 23, at 174.

process. The First, Third, Fifth, and Eleventh circuits, by contrast, assess whether an extraterritorial application of U.S. law is arbitrary or fundamentally unfair by inquiring whether the foreign national had notice that his conduct was subject to U.S. regulation. In doing so, these circuits often look to whether customary international legal principles provide a basis for the United States to exercise prescriptive jurisdiction over the defendant.

This circuit split has real and significant consequences for defendants in extraterritorial material support to terrorism prosecutions like *United States v. Ahmed*. Under the nexus test that the District Court for the Eastern District of New York is likely to apply, prosecutors can argue that the defendants' conduct had a sufficient connection to the United States because their material support to al-Shabaab, a designated terrorist organization, threatens the United States' national security interests in the stability of Somalia and the Horn of Africa and, by the logic of *Holder v. Humanitarian Law Project*, frees up resources that can be directed against the United States. In other words, nexus test jurisdictions—the Second, Fourth, and Ninth circuits—will always find a sufficient connection to the United States in extraterritorial 18 U.S.C. § 2339B prosecutions simply because of the group's designation as a terrorist organization. By contrast, if the defendants in *United States v. Ahmed* were prosecuted in a notice test jurisdiction—the First, Third, Fifth, or Eleventh Circuit—they could more successfully argue that the application of U.S. law to their overseas conduct violates the Due Process Clause; because customary international law does not provide the United States with a basis to exercise jurisdiction over a foreign national's material support to a foreign terrorist organization where that support is not directed against the United States or U.S. nationals, the defendants in *United States v. Ahmed* could claim that they had no fair warning that their activities abroad were subject to U.S. regulation.

The emptiness of the nexus test is a result of the Second, Fourth, and Ninth circuits too heavily drawing on *Allstate*'s state choice of law decision, which intermingled its Due Process Clause analysis with its Full Faith and Credit Clause analysis and created a standard that seemingly emphasized state contacts and interests at the expense of individual fairness. The application of the nexus test to the due process claims of the defendants in *United States v. Ahmed* demonstrates that *Allstate*'s focus on state interests is magnified in the extraterritorial material support to terrorism context; in these prosecutions, the United States' interests arising from its contacts with the defendant's activities abroad—however indirect that contact might be—are of paramount significance and, given the judiciary's practice of deferring to the Executive Branch in national security affairs, courts are likely to find that they trump an individual alien defendant's liberty interests.

The notice test is, by comparison, significantly more protective of foreign nationals' due process rights because it assesses whether the alien defendant had fair warning that the United States could prosecute him for his overseas conduct. By using customary international principles of extraterritorial prescriptive jurisdiction as a proxy for notice, the First, Third, Fifth, and Eleventh circuits make sure that only foreign nationals who had fair warning of the unlawfulness of their conduct are subject to U.S.

prosecution. This approach is more consistent with traditional conceptions of due process as an individual right and with the Supreme Court's concern about the reasonable expectations of defendants in *Home Ins. Co. v. Dick*.

Ultimately, the Supreme Court will need to resolve this circuit split. While the nexus test may allow the United States greater flexibility in terrorism prosecutions, the Court must acknowledge that, by prevailing over the due process rights of every foreign national who provides material support to a designated terrorist organization in a conflict abroad, this hollow standard undermines the very rights that it seeks to protect. Instead, the Court should recognize that the notice test is the best way of ensuring that the United States' prosecutions for extraterritorial material support to terrorism are consistent with the Fifth Amendment's Due Process Clause. Doing so will put some foreign supporters of terrorist organizations beyond the reach of federal prosecutors, but it will go a long way towards strengthening the U.S. justice system at a time when the government's counter-terrorism strategy is increasingly relying on the integrity of that system.